UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BEVERLY HEALTH AND REHABILITATION SERVICES, INC., ITS OPERATING REGIONAL OFFICES, WHOLLY OWNED SUBSIDIARIES AND INDIVIDUAL FACILITIES AND EACH OF THEM, AND/OR ITS WHOLLY OWNED SUBSIDIARY BEVERLY ENTERPRISES – PENNSYLVANIA, INC., d/b/a BEVERLY MANOR OF MONROEVILLE, et al.

and **Case 6–CA–27873, et al.**

DISTRICT 1199P, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL–CIO, CLC, et al.

***JoAnn F. Dempler, Dalia Belinkoff and Julie Stern, Esqs.,* for the General Counsel.**
***Timothy Sears, Esq.,* for the Charging Unions.**
***Hugh Reilly* and *Donald L. Dotson, Esqs.,* of Fort Smith, AR and *Warren M. Davidson and Thomas P. Dowd, Esqs. (Littler, Mendelson, Fastiff, Tichy & Mathiason, P.C.), o*f Baltimore, MD, for Respondents.**

DECISION

Statement of the Case

Robert T. Wallace, Administrative Law Judge: These cases were tried at 6 locations in Pennsylvania (Scranton, Franklin, Harrisburg, Pittsburgh, Johnstown and Reading) on 20 days between July 15, 1996 and May 6, 1997.

The original charge was filed on February 13, 1996[1] by District 1199P, Service Employees International Union, AFL-CIO, CLC. Thereafter numerous additional charges[2] were filed by that union and by two other SEIU affiliated unions (Local 585 and Local 668). A Consolidated Complaint against the captioned Respondents issued on May 9 and this was succeeded on June 19 by an Amended Consolidated Complaint, and the latter was amended up to and through conclusion of hearings.[3]

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[1] All dates are in 1996 unless otherwise indicated.

[2] 6--CA--28061, 28073, 27874, 28046, 28075, 27875, 28049, 28074, 27876, 28013, 28050, 27877, 28014, 28015, 27878, 27996, 28020, 28054, 27879, 28019, 28047, 27880, 28023, 28045, 27881, 28024, 28057, 27882, 28025, 28052, 27883, 28026, 28051, 27884, 28058, 28076, 27889, 28012, 28059, 27890, 28048, 27891, 27892, 28060, 28077, 27893, 28079, 27894, 28053 and 28081.

[3] In its brief General Counsel seeks further to amend the complaint to delete paragraph G6 and to include 4 additional charges. Respondents opposed the latter. The requested deletion is granted. Inclusion of additional charges is denied. No adequate reason is advanced as to why

Continued

At issue is whether Respondents violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act by unilaterally changing terms and conditions of employment, by: refusing the Unions' information requests, refusing to bargain over specific issues, delaying grievance processing, and by-passing the Locals and dealing directly with employees. Also, there are numerous allegations of coercive and discriminatory conduct in violation of Section 8(a)(1) and (3) of the Act, including failing promptly to reinstate approximately 450 employees who engaged in a three day strike beginning on April 1.

On April 4, 1997, the United States District Court for the Western District of Pennsylvania in *Kobel v. Beverly Health and Rehabilitation Services, Inc., et al,* (No. 96-1280), a proceeding brought by the Board under Section 10(j) of the Act, ordered reinstatement of the strikers and union access to bulletin boards as of May 5, 1997 subject to a proviso that the order will expire 6 months from April 1 absent my decision within that period. Upon request of the General Counsel, the Court on October 3 extended the deadline for 60 days.

Resolution of whether the various "Beverly" companies constitute a single entity such that a single remedial order can and should issue against all of them has been deferred for resolution in a subsequent proceeding in a "bifurcating" order issued by me on May 1, 1997.[4] Accordingly, unless otherwise indicated, the term Respondents in this decision refers only to the two Beverly companies directly responsible for operations in the particular nursing homes at which violations are alleged to have occurred. Admittedly, these are Beverly Health and Rehabilitation Services, Inc. (BHRI), headquartered at Ft. Smith, AR, which operates 6 of the homes, and its wholly owned subsidiary, Beverly Enterprises – Pennsylvania, Inc. (BE-P), with headquarters in Leesburg, VA, which operates 14.

On the entire record,[5] including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

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inclusion was not sought before close of the hearing. Failure to do so precluded Respondents from responding either at trial or on brief. In any event, procedural fairness would require reopening for that purpose and I see no compelling need for the attendant delay in disposition of these proceedings. *United Artists Theater*, 277 NLRB 115, 130 (1985).

[4] After citing the District Court's deadline, the Bifurcating Order goes on to state:

> And it further appearing: That presentation of evidence on the single employer issue may "require several weeks" [General Counsel's estimate] of hearing time on a matter involving refinement of remedy rather than the basic question presented in these proceedings and to the Court (i.e. whether unfair labor practices were perpetrated and, if so, remedied at least by normal procedure), That there is an overriding need for expedited disposition of the ULP allegations, That the extraordinary remedies sought present clearly severable issues which can be resolved in a supplementary hearing and decision after the ULP and normal remedy determinations are made (see, *Le Rendezvous Restaurant*. 323 NLRB No. 66 at fns. 2 and 3 (April 14, 1997 as reissued April 18)), And that Respondents will have opportunity promptly to appeal any adverse findings on those determinations and later, if necessary, to contest need for extraordinary remedies . . . .

No request to appeal the order was filed.

[5] The all-party joint motion to correct the transcript, dated July 16, 1997 is granted and received in evidence as Joint Exh. 3.

Findings of Fact

I. Jurisdiction

Respondents are part of a corporate group which operates approximately 950 nursing homes throughout the Nation. As pertinent to these proceedings, they operate numerous homes in Pennsylvania, deriving therefrom $500,000 or more annually in gross revenues. They admit (and I find) that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Unions are labor organizations within the meaning of Section 2(5) of the Act.

A threshold issue concerns Respondents' affirmative defense that consolidation of these cases violates: (a) case handling rules and precedents and (b) provisions of a "standstill" agreement negotiated with the General Counsel. As to (a), I find sufficient commonality of issues and parties to warrant consolidation. Among other things, the alleged unilateral actions and strike involved most of the nursing homes, while the local unions are SEIU affiliates and Respondents allegedly constitute a single employer. As to (b), the agreement expressly provides for expiration by either party on 10 days' notice. The General Counsel availed himself of that provision and terminated the agreement by letter dated April 26. Respondents do not dispute receiving that notice 10 days before issuance of the Consolidated Complaint on May 9. Accordingly, the agreement plays no role in these proceedings. I reaffirm my earlier ruling striking the affirmative defense.

II. Background

Each of the 20 nursing homes involved herein[6] have bargaining units of service and maintenance employees, including certified nurses assistants (CNAs), and 9 also have units composed of licensed practical nurses (LPNs), and (with the exception of York[7]) each has its own collective bargaining agreement(s). In all instances, the agreements are signed "BE-P doing business as" one of the 20 individually named nursing homes. Two agreements, each pertaining to service and maintenance employees at Grandview and Lancaster, respectively, expired on December 31, 1994. Agreements at the 18 other facilities expired on November 30. The latter were all signed for BE-P by its Regional Director of Associate Relations for the Northeast Region, Wayne Chapman.

III. Alleged Bargaining Violations

A. Unilateral Actions

1. Overview

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[6] Beverly Manor of **Monroeville**, **Clarion** Care Center, **Fayette** Health Care (Uniontown), **Franklin** Care Center (Waynesburg), **Grandview** Health Care (Oil City), **Haida** Manor (Hastings), **Meadville** Care Center, **Meyersdale** Manor, **Mt. Lebanon*** Manor, **Murray*** Manor (Murrysville), **Richland** Manor (Johnstown), **William Penn*** Nursing Center (Lewistown), Beverly Manor of **Reading** (Mt./ Penn), Beverly Manor of **Lancaster**,* **Blue Ridge*** Haven Convalescent Center (Camp Hill), **Caledonia** Manor (Fayettsville), **Camp Hill** Care Center, **Carpenter** Care Center (Tunkhannock), **Stroud*** Manor (Stroudsburg), **York** Terrace Nursing Center (Pottsville). Asterisks indicate facilities operated by BHRI rather than BE-P.

[7] The LPN unit at York was certified on August 27 and the Board upheld the certification on September 23. However, no collective bargaining agreement had been reached as of the time of close of hearings herein.

Shortly after the November 30 expiration date and while bargaining for new contracts continued, Respondents allegedly pursuant to directives from Chapman unilaterally (i.e. without giving the unions notice and opportunity to bargain) implemented changes in terms and conditions of employment of in the following areas: dues deductions, union access, bulletin board notices, health care insurance, hours of work, and in "other" areas.

The Board and the Courts have held, with a few exceptions, that terms and conditions of employment embodied in a collective bargaining agreement remain in effect following the expiration of the contract. Such terms and conditions may not be modified without bargaining and the parties either reaching agreement or coming to impasse. *NLRB v. Katz*, 369 U.S. 736 (1962); *Luden's Inc. v. Local 6, Bakery Workers*, 28 F.3d 347 (3rd Cir. 1994); *Champion Parts Rebuilders v. NLRB*, 7l7 F.2d 845 (3rd Cir. 1983); *Leeds & Northrup Co. v. NLRB*, 39l F.2d 874 (3rd Cir. 1968); *Industrial Union of Marine and Shipbuilding Workers v. NLRB*, 320 F.2d 6l5 (3rd Cir. 1963), cert. denied 375 U.S. 984 (1964). This principle is generally applicable to each of the unilateral changes at issue herein. Those changes will be considered *seriatim* with a view to determining whether exceptions apply.

2. Dues Deductions

Each of the 18 contracts that expired November 30, l995 contained union security clauses and dues checkoff authorizations. Prior to expiration of those contracts, Respondents deducted union dues from the employees' paychecks and remitted them to the appropriate local union. Pursuant to a written directive from Chapman, dated December 7, all deductions and remittances promptly ceased at the 18 facilities.[8] This was done even though none of the affected bargaining unit employees had revoked dues checkoff authorizations they had previously executed.

The Board uniformly has held that an employer's duty to check off and remit union dues is a creature of the existing contract which expires on termination of the underlying collective bargaining agreement. As stated in *Bethlehem Steel Company (Shipbuilding Div.),* 136 NLRB 1500, 1502 (1962) (emphasis added):

> **The acquisition and maintenance of union membership cannot be made a condition of employment except under a contract which conforms to the proviso to Section 8(a)(3). So long as such a contract is in force, the parties may, consistent with its union-security provisions, require union membership as a condition of employment. However, upon the termination of a union security contract, the union-security provisions become inoperative and no justification remains for either party to the contract thereafter to impose union-security requirements. * * * <u>The union's right to such checkoffs in its favor, like its right to the imposition of union security, was created by the contracts and became a contractual right which continued to exist so long as the contracts remain in force.</u>**

See also *Robbins Door & Sash Company, Inc.*, 260 NLRB 659 (1982); *Ortiz Funeral Home*

[8] Although Respondent had previously ceased deducting dues at **Grandview** and **Lancaster** on the expiration of their contracts on December 31, 1994, that unilateral change is not included within the instant complaint apparently because no charge was filed within 6 months of the cessation.

***Corp.,* 250 NLRB 730, 731, n. 6 (1980); *Trico Products Corporation,* 238 NLRB 1306, 1308-1309; (1978); *Aerospace Workers, District No. 15*, 231 NLRB 602, 603 (1977). Further, in its most recent case addressing the issue, the Board adhered to precedent and held: "an employer's duty to check off and remit union dues is extinguished upon the expiration of the collective bargaining agreement." *87-10 51st Avenue Owners Corp*., 320 NLRB 993 (1996). In light of these precedents, allegations in the Complaint regarding dues checkoff will be dismissed.**

In reaching that conclusion, I have considered and rejected the contention of General Counsel and the Charging Unions that "previously decided case law is distinguishable from the instant case, or even incorrectly decided. I see no significant distinction; and, in this circumstance, any need for change in established law is a matter for the Board to decide. *Iowa Beef Packers, Inc*., 144 NLRB 615, 616 (1963).

3. Access

Each of the contracts requires Respondents to permit respective local union representatives reasonable access to the nursing homes. This right of access enabled them to meet with employees at the workplace in order to investigate grievances, to collect information related to collective bargaining negotiations, and to generally deal with employee concerns. The access granted to union representatives was an existing term and condition of employment at the time of the expiration of the contracts. Upon expiration, Respondents were required to maintain the status quo until they fulfilled their bargaining obligations. See *West Lawrence Care Center*, 308 NLRB 1011, 1015 (1992); *T.L.C. St. Petersburg,* 307 NLRB 605, 610 (1992); *Colonna's Shipyard,* 293 NLRB 136, 141 (1989); *Houston Coca-Cola Bottling Company*, 265 NLRB 766, 777-778, enfd, in pertinent part 740 F.2d 398 (5th Cir. 1984).

Despite the provisions of the expired contracts, Chapman in the December 7 memorandum instructed facility administrators immediately to deny access to union representatives. At least 15 administrators complied,[9] and in some cases they summoned police to evict reluctant union agents. Thereafter, those administrators continued to deny union representatives opportunity to meet informally with employees at the workplace, and they were allowed entry only to attend specifically prearranged meetings with management.

These admitted actions constitute clear violations of Respondents' bargaining obligations under the cases cited above. In this instance, however, Respondents are the ones who urge a change of policy, arguing that the present law is inconsistent with rationales in subsequently decided cases involving related matters. Here too I decline to intrude on the Board's prerogatives.

I find that the denial of access to Union representatives at the 15 facilities violated Section 8(a)(5) and (1) of the Act, as alleged.

4. Bulletin Boards

[9] Although administrators at **Mt. Lebanon** and **Haida** attempted to establish that access was denied because union representatives failed to give proper notice of his/her presence at those facilities or to provide an appropriate reason for access, it is clear that access was denied based on the corporate directive. Denial of access is not alleged with respect to the **Clarion, Franklin, Meyersdale, Murray and Lancaster** nursing homes.

Each of the contracts provides that Respondents will make a bulletin board available to the union representing employees at each home. The Locals made frequent use of the bulletin boards in order to communicate with the represented employees on a day to day basis. As with access rights, provisions in collective bargaining agreements for use of bulletin boards for union postings became "terms and condition of employment" by virtue of inclusion in bargaining agreements, such that upon the expiration of the agreements, an employer is required to maintain the status quo until fulfilling its bargaining obligations. See *West Lawrence Care Center,* 308 NLRB 1011, 1015 (1992), *supra*; *Arizona Portland Cement Co.*, 302 NLRB 36, 44 (1991); *Pioneer Press*, 297 NLRB 972, 983-984, 987-988 (1990).

Accordingly, removal of the bulletin boards and/or union related items posted thereon at 16 of the homes[10] that occurred on receipt of Chapman's December 7 directive, unilaterally changed the existing bulletin board practice in violation of Section 8(a)(5) and (1), as charged.

5. Health Insurance

Contract provisions also require Respondents to offer an HMO as an alternative to the Beverly Medical Plan. Following the execution of the most recently expired contracts, a dispute arose over the circumstance that no HMO was conveniently located for employees at Clarion, Fayette, Franklin, Meadville and York. That controversy was resolved by a grievance settlement in late 1994 which provides that Local 1199P's Health and Welfare Fund would be made available to employees at the 5 facilities. Paragraph 3 of the settlement states:

> **The parties agree that the 1199P Health and Welfare Fund shall be a provider for a minimum period of one year under the term of the current collective-bargaining agreement at each above named facility. Such participation will automatically cancel unless the parties agree to extend such participation through future collective-bargaining negotiations.**

That language unequivocally rebuts the general presumption that terms and conditions of employment established by an expired contract continue absent agreement after bargaining or impasse. Therefore, Respondents had a right to terminate the 1199P plan on November 30. However, they were not free thereafter unilaterally to implement a replacement plan in the face of a timely union request for bargaining on the matter. *Newton Sheet Metal, Inc. (Carpenter)*, 238 NLRB 974 (1978), enfd. in pertinent part 605 F.2d 60 (2nd Cir. 1979). The situation is akin to direct dealing with represented employees, albeit by-adding benefits. *Martin Marietta Energy Systems*, 283 NLRB 173, 175-176 and fn. 19 (1987) enfd. mem. 842 F.2d 332 (6th Cir. 1988); *St. Vincent Hospital*, 320 NLRB No. 4 (1995).

Here, a request for bargaining was made by District 1199P in a letter dated December 5. Therein, Union president DeBruin, after noting that he had received no response to his request for continuation of coverage under its Health and Welfare Fund, went on to state [emphasis added]:

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[10] Bulletin Board violations are not alleged to have occurred at **Meadville, Mt. Lebanon, Blue Ridge** and **Carpenter**.

. . . I understand from concerned employees that the Company has unilaterally announced the discontinuation of current coverage and has threatened employees in some facilities with loss of medical coverage unless they agree to sign up for plans that are being unilaterally presented to employees without any negotiations with the Union. Let me state the obvious, the Union considers this to be a clear violation of your duty to bargain in good faith over these matters! We will be immediately filing grievances in each facility, as well as unfair labor practice charges. We demand that you bargain in good faith over these issues, and we will be demanding that you make any and all employees whole over any losses as the result of your actions.

Respondents, through Chapman, promptly rejected the request and proceeded to implement the replacement HMO plan on January.[11] In doing so, they ignored their obligation to bargain in violation of Section 8(a)(5) and (1). As to discontinuance of the 1199P Plan, I find no violations in light of the agreed-to expiration date, and allegations with respect thereto will be dismissed.

6. Hours of Work

Beginning on February 5, and continuing thereafter up to the strike, work hours of a number of unit employees (primarily in the laundry department) at 13 of the nursing homes were reduced. This was done by on recommendation from officials at Respondents' regional headquarters in Leesburg, VA. Most of the reductions were due to implementation of an incontinence program under which disposable diapers ("Attends") replaced cloth ones, thereby reducing need for some laundry workers.[12]

Regardless of a company's motivation for a reduction of hours, it is axiomatic that an employer whose employees are represented for purposes of collective bargaining must bargain before changing hours of employment absent a waiver by the union. Specifically, Respondents were obligated to bargain over the effects of the implementation of the Attends incontinence program as well as other changes resulting in the reduction in hours. See *NLRB v. Borg-Warner Corp.,* 356 U.S. 342 (1958); *Atlas Microfilming,* 267 NLRB 682, 695-696 (1983), enfd. 753 F.2d 313 (3rd Cir. 1985). However, they are here shown to have implemented the Attends program and reduced the working hours of unit employees without giving prior notice to the Locals and without affording them opportunity for effects bargaining.[13]

Respondents contend they were freed of any obligation to bargain because the Unions waived their rights by agreeing to a broad management rights clause contained

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[11] Respondents view DeBruin's December 5 letter as requesting bargaining only in regard to continuation of coverage under the Union Health and Welfare Fund. However, in demanding bargaining on "these issues," the letter plainly refers to both the Unions' proposed continuation and new plans proposed by Respondents.

[12]The Attends program was responsible for reduced hours at 10 nursing homes: **Monroeville, Clarion, Fayette, Franklin, Haida, Mt. Lebanon, Murray, Richland, William Penn and Camp Hill.** Other facilities at which hours of unit employees were reduced are: **Grandview, Lancaster and Caledonia.**

[13] Although an administrator at the **Monroeville** facility notified Local 199P of the Attends program, he did so on January 16 -- the day it was implemented. Another administrator (**Haida**) claims to have given advance notice to Local 585, but later admitted that the notice was sent after the implementation decision was made. Further, she admits to having sent the notice by mistake.

in each of the expired contracts. Among other things, the clause gives Respondents the right to effect reductions in hours without bargaining provided reductions are made in accordance with seniority rules contained in the contracts.

A management rights clause, while a contractually negotiated item, is not a term or condition of employment in the same sense as the traditional terms and conditions of employment such as wages or health benefits. To the extent that a management rights clause authorizes unilateral action to change matters that are mandatory subjects of bargaining, it entails a union's waiver of its statutory right to bargain over those matters. *Holiday Inn of Victorville*, 284 NLRB 916 (1987). Waiver of such a right must be strictly construed; and the Board consistently has held that a waiver of bargaining rights under a management rights clause does not survive the expiration of a contract. *Buck Creek Coal,* 310 NLRB 1240 (1993); *Control Services,* 303 NLRB 481 (1991), enfd. 141 LRRM 2208 (3rd Cir. 1994) and 140 LRRM 2248 (3rd Cir. 1992); *Kendall College of Art*, 288 NLRB l205, 1212 (1988).

Respondents also argue here, and in connection with other unilateral changes, that the Unions waived their rights by failing to request bargaining, citing cases that are inapposite either because management rights (and complementary seniority) clauses were operative under unexpired contracts or where meaningful notice had been given *before changes were made.*

In these circumstances, I find that Respondents by unilaterally reducing hours at the 13 facilities violated Section 8(a)(5) and (1).[14]

7. Other Unilateral Changes

In addition to the unilateral changes identified above, Respondents made various other unilateral changes affecting service and maintenance unit employees, some of which also changed their terms and conditions of employment established by contract provisions.[15] Like the unilateral changes discussed above, the ones cited herein were made without prior notice to the appropriate Local and without affording that union an opportunity to bargain. For the most part, the changes are not controverted by Respondents. Instead, as justification they point to the management rights clause in their expired contracts. That excuse fails for the reasons stated above in connection with reduced hours.

In particular, at Monroeville, Respondent BE-P implemented a new disciplinary policy for medication errors.[16] At Clarion, it changed absenteeism policy and combined two unit positions in the dietary department into one new position. At Fayette, it changed policy with respect to requiring medical excuses following "calloffs," i.e., employees were asked to provide a doctor's excuse for 1-day instead of 3-day medical absences. At

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[14] The complaint also alleges employees at **Monroeville** were laid off "about January 16" as a result of implementation of the Attends program. While denying any layoffs in January, Respondents admit that Attends related layoffs occurred there in early February. I find the allegation sufficient to include the February layoffs, particularly since any Attends-based force reductions were unlawful. However, there is no showing that laid off laundry workers included Irene Susman and Blanche Lyons or that they or any other employees at **Monroeville** were denied bumping rights. Accordingly, allegations A18, 19 and 20 will be dismissed.

[15] Other allegations of unilateral changes and other unlawful actions specific to LPNs are considered in a separate subsection of this decision.

[16] In its brief BE-P claims the policy was a mere codification and not "new." However, the complaint allegation is admitted in its formal answer.

Franklin, it changed the scheduling of in-service meetings by requiring employees to attend those meetings during working hours instead of before or after the shift and it failed to post work schedules two weeks in advance as required by the contract. At Grandview, it changed rules relative to vacation scheduling and duration.

At Meadville, BE-P restructured its dietary department by changing job descriptions and ignored contract provisions by: failing to notify Local 585 of discharges,[17] changing vacation and personal day policies and failing to post a new CNA position created in late February.[18] At Meyersdale, it changed past practice with respect to scheduling of in-service meetings by requiring employees to attend during working hours. Past practice had been to combine several topics and hold a one-hour in-service meeting for employees before or after shifts and pay overtime for attendance. This was changed to scheduling "mini" in-services on one or two matters during shifts, with no overtime.[19]

At Richland, BE-P admittedly eliminated the full-time position of activities aide and changed it to a part-time position, with attendant loss of benefits. At Caledonia, it changed practice with respect to the 2-week advance posting requirement in the contract relative to work schedules[20] and assigned CNA unit work to non-unit employees, thereby reducing the size of the bargaining unit by 3 vacant CNA positions.[21] At Camp Hill, it admittedly required employees to work mandatory overtime. At York, it altered overtime policy by removing unit employees who volunteered for overtime from the mandatory overtime rotation procedure set forth in the contract.[22]

At Mt. Lebanon, Respondent BHRI changed the name badge - time/keeping policy by requiring employees to present their name badges upon reporting for work in order to punch in. Employees who forgot their name badges were required to return home to retrieve them and were docked for time missed. At Murray, it admittedly combined jobs in dietary and laundry departments and assigned a non-unit employee to do unit work in

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[17] I credit unrebutted testimony of union steward Nancy Huttlemayer that Local 585 was not given timely notice of discharges in December, 1995 of two employees (Dan Bump and Julie Whitman) as required by the expired contract. However, since there is no evidence that was the case when another employee (Kelly Smith) was discharged, allegation G16(b) will be dismissed.

[18] General Counsel claims that BE-P's interviewing applicants for bargaining unit positions in February also violated posting provisions. No definite hiring commitments appear to have been made, and it had a right to provide for personnel needs in the event of a strike.

[19] In this matter I have credited testimony of CNA Amiee Miller over that of administrator Mike Walker, finding the former to be more candid and her testimony more detailed than the latter. In this regard, Walker apparently opted not to support his testimony with records which might have resolved conflicts.

[20] In response to shop steward Kauffman's grievance about this matter, facility administrator Spinazzola wrote: ". . . no violation has been made for the schedule is being posted in a time like manner [2 or 3 days in advance] and presently we are not honoring the two week posting for the union contract has still not been negotiated as of this date."

[21] I find credible and accept the steward's testimony that Spinazzola told her that she (Spinazzola) had directed LPNs and RNs to do CNA work in response to her (Kauffman's) complaint about short staffing.

[22] Administrator Postupak admits that the change varied from procedure required under the contract but claims she did so on an "experimental" basis and only for a few weeks. Another alleged unlawful variance in overtime procedure, cited in T17(b) of the complaint, is not supported by substantial evidence and will be dismissed.

the laundry department.[23] At William Penn, it permanently assigned many of the duties of a unit position (activities aide) to a supervisor, thereby effectively eliminating the aide position.[24]

Many of these "other" changes dealt with basic terms and conditions of employment and were therefore mandatory subjects of bargaining and some, like access for union representatives and bulletin boards, became terms and conditions of employment by being subject of contractual provisions that survived expiration of the contracts. By unilaterally effecting them, Respondents violated Section 8(a) (5) and (1).

B. Bargaining Requests

In a number of instances, unilateral changes followed or were accompanied by urgent requests for bargaining that, admittedly, were either rejected or ignored. Thus, at Clarion and Fayette the requests concerned implementation of the Attends program, At Meadville they were directed: (1) to workplace safety concerns arising out of fire at the facility, (2) to the transfer of an employee (Barbara Glancy) from an 8:00 a.m. to 4:00 p.m. shift to a newly created 5:30 p.m. to midnight shift, (3) to failure to return unit employees whose hours had been reduced (or who had been laid off) to their previous positions prior to hiring new employees for those positions, (4) reorganization of the dietary department resulting in changed job descriptions and hours of work and (5) changes of policy concerning use of personal days and a change of the last day vacation days may be used each year from December 31 to December 15. Plainly, the changes involved terms and conditions of employment that, absent the expired management rights clause, gave rise to bargaining obligations. *Detroit News*, 319 NLRB 262 (1995); *Legal Aid Bureau*, 319 NLRB 159 (1995). Accordingly, in failing to bargain on these matters, BE-P also violated Section 8(a)(5) and (1).

C. Direct Dealing

In mid-December 1995, the director of nursing (DON) at Haida (Lisa Sedlemyer) approached CNA Darlene Prosser (an employee represented by Local 585) while the latter was at work in a resident's room. She told her that management was trying to solve employee problems so as to avert a strike; and she asked Prosser "what it would take" to achieve that result. Prosser volunteered that a pension plan and medical insurance would help as would "more hands on the floor." In response, Sedlemyer asked for suggestions in regard to staffing. Prosser offered several; and Sedlemyer recorded the answers on a clipboard. Sedlemyer had similar discussions with about 10 other CNA members of the bargaining unit.

In mid December 1995, a reduced resident census created an over staffing problem at Caledonia. Administrator Maria Spinazzola resolved it by reducing the workday for all personnel at the facility by ½ hour, effective January 4. As applied to employees in dietary, laundry and housekeeping departments, Spinazzola (in response to a grievance filed by Local 668) justified the reductions on the basis a consensus

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[23] Although it is alleged that BHRI also failed to follow seniority rules in awarding jobs, evidence in that regard is sketchy and inconclusive. The allegation in J12 will be dismissed.

[24] Also alleged (L16) as a unilateral change in a term and condition of employment at **William Penn** is the removal of pay telephones from nursing station areas. The phones were simultaneously relocated to the main lobby. I find no violation. The change was not sufficiently significant to create a bargaining obligation (*Peerless Food Products*, 236 NLRB 161 (1978)); and there is no allegation that it was retaliatory.

"vote" of those employees taken at the facility in December.[25]

In both instances, BE-P bypassed the appropriate Local and dealt directly with employees over terms and conditions of employment.

The Board has held that direct dealing need not take the form of actual bargaining. Rather, the issue is whether an employer's direct solicitation of employee sentiment over working conditions is likely to erode the union's position as exclusive representative. *Allied-Signal, Inc*., 307 NLRB 752, 753-754 (1992).

I find that in dealing directly with its employees, Respondent BE-P has denigrated the two Locals as collective bargaining representatives of its employees and that this direct dealing constitutes a violation of Section 8(a)(5) and (1), as alleged.[26]

D. Information Requests

At various times since about October 1995, at 6 facilities, the appropriate Local made certain information requests to Respondent BE-P in relation to service and maintenance employees.

The Act imposes a basic duty upon employers to provide information to a union, upon request, which is relevant and necessary to the union's role in the bargaining process. The Board and the Courts long have held that information concerning wage rates, job descriptions and other information pertaining to employees within the bargaining unit is presumptively relevant. *Curtis-Wright Corp., Wright Aeronautical Div.,* 145 NLRB 152 (1963). Moreover, the standard for relevancy is a liberal, discovery type standard. *NLRB V. Acme Industrial Co.,* 385 U.S. 432 (1967).

While Respondent made no response (no timely response in some cases) to the requests at issue, it denies that any of them were "relevant and necessary" for performance of the unions' duty as collective bargaining representative. Specifics concerning the requests are set forth below.

Following announcement of adoption of the Attends program, a representative of Local 1199P wrote separately on January 18 to administrators at Clarion and Fayette asking for information relative to the goals of the program, data as to how it was to be implemented, and statistics relating to the experience of other BE-P homes where the program already had been implemented. The Local explained it needed the information:

> **. . . to bargain over the program since you stated it is reducing bargaining unit positions. We also feel you will be creating health and safety issues for staff as well as residents.**

The letters were never acknowledged and no information was provided.[27]

Shortly after BE-P admittedly reduced hours of work and laid off employees at Grandview and Meadville, Local 585, by separate letters dated January 18, requested information concerning the facilities' monthly patient census, monthly revenue expenditure reports, daily and monthly recorded staff hours, and proposed reductions

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[25] The Local won the grievance and unit employees were given back pay.

[26] The allegations, though formally denied, are not contested.

[27] Although the Answer denies that **Fayette** was requested to furnish the information, the evidence clearly shows that request was made.

for non-bargaining unit personnel. It did so expressly for purposes of bargaining about the reductions (layoffs).

Here too, the letters went unacknowledged and no information was provided.

Local 585 sent 3 other written requests for information to the Meadville administrator. In the first, dated January 11, it asked for "a copy of the complete 'Log of Injuries and Illnesses' (OSHA 200 Forms) or equivalent reports covering the years 1992 and 1993." On January 17, it requested access to a terminated employee's (Vicki Mumford) personnel file in connecting with a grievance investigation. In the third letter, dated January 29, it sought reports and investigations relative to a recent fire at the facility "in order to properly investigate a pending health and safety grievance." Admittedly, there was no response to the requests of January 11 and 29; and in connection with the January 17 request, BE-P denied timely access by not making the file available until May.

At Carpenter, a representative of Local 1199 (CNA Audrey Russell) asked management, in mid December, for absenteeism records after a number of unit employees had been written up for that infraction. Her purpose was to use the information in processing grievances. And in late January she requested information regarding the suspension of employee Sue Teetsel, including her personnel file and any written statements made concerning the incident. About a week later, not having received a reply, she approached facility administrator Jeff Rentner. The latter declined to provide any of the requested data because corporate personnel director Wayne Chapman had told him "he could not give it to me, that it was personal."[28] Admittedly, in both instances, the requested information was not provided.

The contract at York requires BE-P to post an updated seniority list on the union bulletin board every three months with copies sent to the Local at the time of posting. Local 1199P uses the list for, among other things, ascertaining whether mandatory overtime is being assigned in accordance with seniority provisions. Not having received lists for September 30 and December 15, Local representative Alan Silberman on January 15 reminded management of that circumstance and demanded a current list. Administrator Arlene Postupak provided the September 30 list a few weeks later. A current list was never provided.[29]

In November, and again on December 18, Silberman requested York employee schedules, lists of mandatory overtime and nursing hours recorded; stating that the information was for the dual purpose of enabling the Local to understand how mandatory overtime provisions in the contract were being administered and to monitor enforcement of a grievance settlement involving posting of full-time day shift jobs. Admittedly, the information was never provided. In December, January and again in February, Local 1199P also requested copies of OSHA logs of Injuries and Illnesses (OSHA 200 Forms), logs that it routinely had requested and received in the past. The logs

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[28] In an apparent effort to explain Chapman's comment, Respondents argue on brief that the information sought was personal and confidential and that the request was denied to protect the privacy of grievant Teetsel. The argument is without merit. The union admittedly represented Teetsel and acted on her behalf.

[29] Respondents' formal denial of the allegation that seniority lists were not provided apparently is based on employee/union delegate Anna Rokosky's testimony that she received lists on July 23. Besides the extensive and unexplained delay, no lists were sent directly to the Local contrary to prior practice under the contract. The delay and omission amount to a failure to respond, and I so find.

were not timely provided.[30] Finally, the "call list" pertaining to assignments of mandatory overtime in December, was requested by union delegate Antoinette Bainbridge on January, 15 for grievance processing purposes. Although the pertinent grievance was settled two weeks later, neither the call list nor an explanation was ever provided.

I find that the information sought in each of the described information requests pertains to terms and conditions of employment clearly relevant and necessary to the unions' role in the bargaining process; that notwithstanding expiration of the contract BE-P had a continuing duty, absent impasse in negotiations, to provide that information or contemporaneously to request clarification of any perceived problem.[31] It did neither. Accordingly, and in each instance, I find a violation of Section 8(a)(5) and (1), as alleged.[32]

E. Grievance Processing

The contracts each contain detailed grievance procedures. As to those, it is well established that an employer's obligation to process grievances thereunder survives expiration of a collective bargaining agreement. *Days Hotel of Southfield*, 311 NLRB 856 (1993); *Beitler-McKee Optical Co*., 287 NLRB 1311, 1312 (1988); *Indiana & Michigan Electric Co*., 284 NLRB 53, 54 (1987).

Three grievance processing failures are alleged at Franklin.

The first entails a grievance allegedly filed "sometime" in February by a Local 585 representative (employee Shelley Kennedy) over termination of employee Shirley Wright. Although the Local promised additional evidence on the grievance and reserved exhibit number 266 for it, nothing was provided. Kennedy received no response,[33] and she made no inquiry.

The second grievance, dated March 3, concerns an alleged failure to return moneys to union members following a decision not to implement a pension plan. Kennedy claims she left the grievance in the office of administrator Lou Ann Abbadini, but does not recall whether she left it with a secretary on simply left it there. Abbadini has no recollection of receiving the grievance. Here also, no response was forthcoming from the facility and Kennedy made no inquiry.

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[30] As with the seniority lists, the OSHA logs were made available to Rokosky on July 23, with no explanation for the delay.

[31] Indicative of Respondents' attitude regarding union information requests after contract expiration is an inquiry an administrator appended to a union information request before forwarding it to personnel director Wayne Chapman at the Leesburg headquarters. The inquiry was made on April 5 and reads: "Is this what we were to be slow responding to?"

[32] I find no merit in Respondents' argument on brief that the Board is powerless to find a violation in connection with nonproduction of OSHA "200 Form" logs at **Meadville** because, assertedly, only OSHA can redress wrongful failure to provide access to the logs. Under OSHA regulations, the work related injury/illness data on the forms is not confidential. Rather it is available to employees and their representatives on demand and access is not limited to entries that specifically relate to the employee seeking access. In this circumstance, the question is not whether the Board is attempting to enforce access. Rather, the data being relevant to safety in the workplace, BE-P was free to provide it to the employees' representative; and in choosing not to do so it violated the Act. In this regard, BE-P is shown to have routinely made the logs available to Local 1199P at **York** prior to contract expiration.

[33] The pertinent contract provision requires that grievances be acknowledged within 10 days of being filed.

The third was filed on March 14 and pertains to disciplinary suspension of employee Cindy Connor. The response, although dated March 22, was not given to Kennedy until about April 18. Therein, Abbadini wrote: "File to be reviewed at corporate level." No disposition had been made by November 7 when the matter was the subject of testimony in this proceeding.

I am not persuaded that BE-P received the first or second grievance. As to the third, I decline to find that one instance of inordinate delay in processing grievances entails violation of a bargaining obligation. It is well established that a failure to take a required step is not a violation if it does threaten the overall grievance procedure. *Airport Aviation* Services, 292 NLRB 823, 830 (1989). The allegation of failure to meet with Local 585 to discuss grievances will be dismissed.

At Meyersdale, Local 1199P's representative Tammy Miller admittedly had no trouble in processing grievances at facility level (steps 1 and 2). However, she complains of delay in scheduling meetings to resolve them at the 3rd or corporate level. She claims that prior to expiration of the contract on November 30, 1996, 3rd stage grievance meetings were held within 30 days of a request. Thereafter, one such meeting was held on May 22, and another (originally set for October 3) was reset for a day about two weeks after she testified on January 15. The May meeting resulted in disposition of 12 grievances, two of which had been pending 3rd stage review since about November 1995.

The allegation of refusal to process grievances will be dismissed. Apart from the two stated to have been filed in late 1995, there is no indication of when other grievances were filed, how many were filed and when requests were made for processing them to the 3rd stage. With respect to the "other" grievances, there is no way to determine whether undue delay occurred. As to the two grievances that awaited six months for 3rd stage review, union representative Miller testified that a 3rd stage hearing had been set for "sometime" before January 29 but was postponed at her request; and it is not shown that BE-P was responsible for delay involved in the rescheduling to May 22.

At Carpenter, grievance processing at facility level continued without interruption after contract expiration, but Local 1199P representative Alan Silberman experienced difficulty in arranging for 3rd step meetings at corporate level. He wrote to labor relations manager Ronald St.. Cyr on February 14 asking for an early meeting on "several" grievance appeals, including 4 that he specifically identified. In the past, meetings had been set within a month or six weeks of a request. No reply was received either to the letter or a number of phone calls to St. Cyr. He wrote again on March 25 and made follow-up calls. Again, he received no response. On April 10 he sent another letter in which he listed 6 specific grievances (including the 4 mentioned in his letter of February 14) ripe for 3rd stage review and asked for a meeting date. Thereafter, Silberman and St. Cyr contacted each other by telephone and they agreed to (and did) hold a 3rd stage meeting on May 7.

In light of past practice, I find unreasonable BE-P's unexplained 3 month failure even to communicate in regard to Silberman's request for a 3rd stage hearing on the 4 grievances mentioned in his letter of February 14. This failure frustrated the bargained for grievance procedure in violation of Section 8(a)(5) and (1).

IV. Alleged Rights Violations

Early in the afternoon of Sunday, March 31 and just prior to the strike, about 18 employees participated in leafleting on a road leading up to the Fayette facility. While

doing so, two security guards approached the group. One of them told union organizer Tammy Miller that administrator Jim Filippone wanted the group to move down the road because they were on facility property. As he did this, the other guard stood nearby busily engaged in videotaping the group. When Miller replied that they had a right to be there according to township records, the guards left to report back to Filippone. Later that day Filippone, after obtaining clarification from township officials, told the employees that they need not move. The leafleting was peaceful. Filippone offered no explanation for the videotaping.

The Board has recognized that the public nature of union activity, which would permit an employer to lawfully observe the activity, does not authorize an employer to videotape the employees. *Fairfax Hospital*, 310 NLRB 299, 310 (l993) enfd. 145 LRRM 2072 (4th Cir. 1993). Photographing employees engaged in lawful picketing tends to intimidate by implanting fear of future reprisals and is deemed surveillance violative of Section 8(a)(1), absent some legitimate justification. *Athens Disposal Co.*, 315 NLRB 87 (1994); *Waco, Inc.*, 273 NLRB 746, 747 (1984). None is shown here. Accordingly, I find a violation.

In early March and in anticipation of the strike, BE-P admittedly advertised in local newspapers for replacement employees for Grandview and Meadville; and in the ads it offered them wage rates higher than those paid to unit employees at those facilities. [34] In the context of the numerous instances of unlawful conduct found in this case, I regard the ads as an attempt to undermine the bargaining representative by threatening yet another unilateral action (raising wages) in the event employees chose to engage in the protected action of striking. See, *Service Electric* Co., 281 NLRB 633, fn. 11 (1986). I find a violation of Section 8(a)(1), as alleged.

At Haida the same facts relied upon to show direct dealing (*supra*, pp. 12) are relied upon as also establishing solicitation of and an implied promise to remedy grievances in violation of Section 8(a)(1). Nursing director Sedlemyer's question "What would it take [to avert a strike] ?" and her follow-on request for suggested staffing changes, clearly imply willingness to do what she could to remedy at least those grievances perceived to be legitimate. I find a violation. *Butler Shoes New York, Inc.*, 263 NLRB 1031, 1033 (1982).

Two instances of unlawful surveillance are alleged to have occurred at Haida. The first was on December 2, 1995 when, beginning at 11:00 a.m., approximately 20 to 25 employees engaged in informational picketing in a public area in front of the facility. When CNA Ada Livingston went to the office that morning to deliver a message, she saw four supervisors[35] observing the pickets through a window. Three were making notes and the fourth was videotaping the event.[36] The second incident occurred on March 15

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[34] The allegations, though admitted in Respondents' joint formal answer, are disputed in their brief with no request to amend the answer having been made – a situation replicated a number of times as to other allegations. In presenting the case, General Counsel was entitled to rely on the admissions; and I have accepted them where, as here, there is an absence of clear and undisputed evidence to the contrary.

[35] Nancy Pietak (assistant director of nursing), Brenda Shilling (dietary service manager), Sandy Rake (activity director) and Bernice Yeager. Livingston also "believes" that DON Sedlemyer was there. In light of the latter's claim that she was not at the facility that day, I make no finding in that regard.

[36] It is undisputed that Pietak contemporaneously provided a handwritten listing of picketing employees to facility administrator Pauline Formack. None of the supervisors deny that videotaping occurred.

when about 25 employees led by Jenny Bush (a cook who also was president of the local union chapter), went to the office with a written 10-day strike notice. While Bush was attempting to present it to assistant DON Pietak, she observed supervisors Shilling, Rake and Paula Lloyd "writing down peoples' names."[37]

Here too I find unlawful surveillance. There is no indication that employees' actions in either instance presented any threat of violence or disorder; and Respondent BE-P's representatives offered no explanation for the note taking and videotaping either at or around the time those actions were taken. Accordingly, I find them coercive in violation of Section 8(a)(1).

At Meadville on November 16, 1995, administrator John Ferritto held a mandatory meeting with CNAs just after the 2:00 p.m. shift change. Approximately 25 gathered in the east wing lounge, including a number of CNAs who had not worked that day but came in (some with children) to get paychecks. The latter were told they could obtain checks that day only if they attended the meeting. A number of management personnel were also in the room, including DON Julie Walters, assistant DON Judy Coleman and director of staff development Maria Brink.

The subject of the meeting, which lasted one hour, was a two-page letter dated October 27 sent to labor relations director St. Cyr at BE-P's headquarters in Leesburg, VA on behalf of otherwise unidentified "CNAs of Meadville." The letter indicates copies were sent to personnel director Chapman and the Pennsylvania Department of Public Health. The letter severely criticizes management of the facility for understaffing with consequent adverse affect upon patient care and morale of employees, citing a number of examples. The tenor of the latter is seen from the following excerpt:

> **Then you wonder why so many people call off? We are so physically and emotionally exhausted, if we didn't call off, we would probably end up being committed. You people are literally killing us, and you don't even care! What's worse, you don't appear to care about the residents! You treat us like the scum of the earth. You treat the residents like mindless objects with no feelings when you move them from room to room or wing to wing with no regard to what they prefer. You threaten us with more write-ups and wonder why you can't get help or new admissions.[38]**

CNAs were given a copy of the letter as they entered the room and asked to read it. Later they were given a paper in which they were asked whether they "knew" about the letter and whether they agreed of disagreed with the contents. Some opted to respond, others declined.

Obviously angry and speaking in a loud voice throughout the meeting, Ferritto told the assembled CNAs that the letter "defamed" him; and, according to credited testimony of CNAs Nancy Huttlemayer and Dan Bump, Ferritto went on to call those responsible for the letter "assholes" and "fucking idiots." Also, he told them he was going to move his office to the break room to teach about how their representative (Local 585) misuses their dues and engages in libels which could result to diminished patient load and possible closure. In this regard he referred to a letter sent to a local hospital on August 4 in which the Union discussed purported negative findings of an

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[37] Bush's testimony is not disputed by the supervisors.

[38] Ferritto claims to have first learned of the letter on the day prior to the meeting. However, a log kept by him (GCX 94) shows that on or about the date the letter was sent he knew of the contents and that it was written by LPN Joyce Wiencek.

investigation into patient care at Meadville. Continuing, he cited grievance processing and other areas where Local 585 was not "properly" representing their interests; and, summarizing, he opined that those who continued to support the Local should "get Vaseline and bend over because you are going to get screwed."[39]

Ferritto explains that in calling the meeting he felt the two letters, particularly that of the CNAs ". . . [coming] at the time of our contract expiring . . . [gave cause for] concerns regarding our day-to-day operations from both the financial aspect, as well as an emotional aspect.."

The situation involves much more than Ferritto's expression of views concerning unions. On November 16, aware that the contract was likely to expire on November 30, Ferritto used the CNN letter (which dealt with complaints about "terms and conditions of employment") to convey to them that he, the top official of the facility, viewed their protected concerted activity and union involvement as the choice of "assholes and fucking idiots." By those epithets and the questionnaire, coming at a time when the Union's ability to obtain a new contract was in doubt, Ferritto unlawfully sought to disparage employees from engaging in the protected concerted action of protesting perceived unfair working conditions in calling them "assholes and fucking idiots." I find such conduct violative of Section 8(a)(1), as alleged. *Sheraton Hotel*, 312 NLRB 304, 338 (1993), enfd. in relevant part 146 LRRM 3079 (2d Cir. 1994); *Hearst Corp.*, 281 NLRB 764 (1986).

Also, I find in Ferritto's statement to the assembled CNAs that he was going to move his office down to the breakroom a threat of surveillance, as alleged.

On March 31, Local 1199P held a 10:30 to 11:00 p.m. candlelight vigil for Meyersdale CNAs at a parking lot located about a half mile from that facility. A local minister led the service, and the purpose was to prepare the CNAs for the strike scheduled for the next day. About 35 CNAs participated.

According to undisputed and credited testimony of a participant (CNA Amiee Miller), facility administrator Mike Walker and a security guard videotaped the vigil from Walker's parked tan stationwagon as did security guards in two circling vans.

I find this a paradigm of intimidation through surveillance in violation of Section 8(a)(1).

On the same day about 30 CNAs distributed leaflets on public property just outside the Murray facility. As they did so their activities were continuously videotaped by two security guards from points outside the facility in plain view. Here too I have credited undisputed testimony of a participant (CNA Lanie Broome) and find unlawful surveillance.

As previously found, bulletin boards on which union materials had been posted pursuant to contract provisions were unlawfully removed at most of the facilities (including Richland) after issuance of Chapman's directive of December 7, 1995.

On January 23, a CNA (Margaret Pynkala) at Richland placed union literature on

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[39] Ferritto denies having used the described epithets but admits to using the words "damn," "shit" and the reference to Vaseline. Asked at the meeting to watch his language because children were present, Ferritto replied: "I don't care, I'm pissed."

the table of the break room and also on the walls, lockers, refrigerator and soda machine. These were promptly removed by administrator John Poltrack. When Pynkala asked about the matter, he told her she would be disciplined if she continued to bring union literature into the building. On February 9, after other union related material was removed from the break room, Pynkala and another CNA (Donna Zonts) approached DON Ron Lindrose, and he told them he was aware of Poltrack's prior warning and that he too would discipline Pynkala if she "continued to bring this union stuff into the building."

Employees have a protected right under Section 7 to distribute union related material on an employer's premises during nonworking time and in nonworking areas. *McDonnell Douglas Corp.*, 210 NLRB 280 (1974). Here there is no indication that the union literature caused any significant disarray or damage to property; and, in this circumstance, I find the two blanket prohibitions and removal of literature from the break room violative of that right, as alleged.

Margaret Kephart, an employee in the housekeeping department at William Penn, knitted a variety of pin-on items and sold them to other employees in facility break rooms. She had done so for over 5 years. The pins were fashioned in the shape of hearts, bunnies, shamrocks and one type bore the legend "1199P Power." She carried them on her cleaning cart during the work day.

On February 26, the head of the housekeeping department (Roy King) passed by and noticed a number of "1199P Power" pins on her cart. Admittedly, he did not see her selling them. Nor did he ask if that was what she was doing or remind her of any rules against selling merchandise in patient care areas. He simply told her to "remove them, take them to her car." There is no indication that employees were prohibited from selling items at offduty times in the break room. I conclude she was told to remove the items from the premises solely because he had happened to observe the union logo at a time when the contract had expired and tension about the union was on the increase. I find his statement coercive in violation of Section 8(a)(1), as alleged. I find a similar violation when, also on that day, King admittedly and with no attempt at justification told an employee at the facility to remove union insignia. *St. Luke's Hospital*, 314 NLRB 434, 435 (1994).

On March 21, shortly before the strike, the dietary service manager at William Penn (Gwen Miller) called a cook (April Yoder) and dietary aide (Wanda Hetrick) into her office and after closing the door told them she could get in trouble for what she was about to do, but it was a way they could cross the picket line without being fined by their union. She handed each of them an identical typewritten letter dated March 21 that reads as follows:

> **District 1199P**
> **1402 South Atherton St.** **Re: Resignation**
> **State College, PA 16801**
>
> **Dear Tom DeBruin,**
>
> **I, , am an employee of William Penn Nursing Center. Because the collective bargaining agreement has expired, and its union security provision is no longer in effect, I hereby resign from membership in the union and any and all of its affiliated labor organizations. This change is effective immediately. Any obligations to tender union dues, fees, and assessments are also terminated immediately and, as a nonmember, I am no longer subject to union fines, or assessments if I choose to cross a**

picket line or refuse to comply with other union rules governing members.

Very Truly Yours,

and asked them to sign "right away" at the top and bottom. Then, according to Yoder: ". . . we asked if we'd be fired or anything [for not signing], and she [Miller] said no, you're a good group of girls. So of course, we didn't have time to read it, because she was real quick. Real quick, she was nervous. So we did sign . . . ." In a day or two, Yoder, Hetrick and 5 other unit members signed and presented to Miller a petition in which they asked for return of the resignation letters and claimed they were signed under duress.

On March 25, Yoder saw Miller getting into her car at the facility parking lot and went over to her intending to ask permission to leave early for a doctor appointment. Seeing her, Miller held the steering wheel tightly and appeared upset. When Yoder asked what was wrong, Miller blurted out: ". . . you girls really hurt me bad. You can't believe what I tell you . . . our dietary will never be the same . . . you backstabbed me, you went behind my back and did this." Calming a bit, Miller asked: "Are you going to be striking?" Taken aback, Yoder replied: "I don't know." Miller turned, looked directly at her, and said: "I'll guarantee you one thing, if you do, you won't have the hours that you have when you come back." At that point, Miller shut the car door and drove away.[40]

I find coercive and unlawful, as alleged, department head Miller's: (1) March 21 solicitation of Yoder and Hetrick to resign from the union (by signing the form they would be "good girls" with no need to fear for their jobs) and (2) March 25 interrogation as to whether Yoder would participate in the strike and threat to reduce her hours if she did so. *Heartland of Lansing Nursing Home*, 307 NLRB 152, 158 (1992).

At Reading on March 28, administrator David Pool assembled a group of about 20 employees who were union members and, allegedly, prohibited them from talking about the Union and from wearing Union stickers and buttons.

Testimony as to those allegations was elicited from CNA Melissa Putnam and RNA (Restorative Nursing Assistant) Maria Pedraza. Putnam claims that Pool speaking in a loud voice:

> **. . . explained to us that he was very upset about us going on strike and he didn't want us to talk about the union in any way, that he didn't want us talking about the union to the residents, to our family members, at home, or outside the facility in any way. And that if he found out that we did that we would be terminated . . . [also] He told us we had to take our buttons and stickers off immediately. That if we didn't, we could swipe [clock] out.**

She removed a green sticker bearing the legend "Dignity, Rights & Respect." Initially, she did not recall having worn another sticker stating "Danger, Short Staffing," but at a later point she admits she and others wore those as well as one reading "Beverly, Law Breaker."

For her part, Pedraza states that Pool in a loud and degrading tone of voice:

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[40] Miller denies that the described March 21 and 25 incidents occurred. I have credited Yoder, finding her a candid witness and her testimony replete with truth enhancing detail.

> **. . . gave several threats. He said we were not to talk union in the facility, out of the facility, or anywhere and if he found out we did, we would get reprimanded . . . [perhaps] suspended pending an investigation with possibility of termination . . . [he also] said that we could not wear any union stickers or any union buttons or anything like that.**

Pedraza claims she wore only a "Dignity" sticker that day and that she did not see any other employee wearing "Danger, Short Staffing" or "Beverly, Law Breaker" on March 28.

It is undisputed that prior to the meeting employees had been allowed to wear union buttons "Dignity" stickers in the facility, including resident care areas.

Pool explains that he called the meeting because over a two week period a few employees had worn "Danger, Short Staffing" and "Beverly, Law Breaker" stickers while on duty whereas he noticed everyone was wearing them that day; and because he considered the stickers defamatory. He claims he told the employees that he would not permit those stickers to be worn anywhere in the facility other than the break room. In addition, he told them they were not to discuss union matters on working time in resident care areas.

I am not persuaded that the two employees actually heard what they think they did. Crediting Pool, I find that he specifically identified the two "defamatory" stickers and told employees not to wear them at any place in the facility other than the break room and that he did not mention "Dignity" or other union related insignia. I find nothing unlawful. Apart from the question of truthfulness, the offending stickers were of a type likely to cause unease among residents, *NLRB v. Baptist Hospital, Inc*., 442 U.S. 773, 784 (1979), quoting *Beth Israel Hospital. v. NLRB*, 437 U.S. 483, 505 (1978); *St. John's Hospital*, 222 NLRB 1150 (1976), aff'd in relevant part, 557 F. 2d 1368 (10th Cir. 1977); and the limited prohibition on discussing union matters in the facility is not unduly restrictive. *Aroostock County Regional Ophthalmology Center*, 317 NLRB 218 (1996).

At Caledonia on February 6, a union shop steward (CNA Tena Kauffman) reiterated Zto facility administrator Maria Spinazzola a complaint that CNAs were "always being short staffed and needed more help." Spinazzola told her that because of the complaint she had directed RNs and LPNs to assist in performing CNA duties "when needed." Implementation of that directive previously has been found to be a unilateral change in violation of Section 8(a)(5). I also find that as communicated to Kauffman it constitutes an independent violation of section 8(a)(1) – a threat of retaliation for voicing a complaint about working conditions.

V. Alleged Discriminations

On March 14 in the breakroom at Haida a number of employees (including laundry aide Connie Kollar and CNAs Lee Roundsley, John Katchmer, and Kathy Bernosky) were discussing need for union solidarity during the impending strike. Roundsley, a union member, said she intended to continue working and would cross the picket line if necessary. She claims that Kollar responded by "looking at me" and stating "If any of you people are thinking of crossing that picket line, you better watch your back." For her part, Kollar (supported by Katchmer) claims to have said "You should think long and hard before you do that."

The Unions' original 10-day strike notices were sent to Respondents on March 15.

On March 20 facility administrator Pauline Formick approached Roundsley , explained that she had heard about a threat, and obtained Roundsley version of the March 14 breakroom dialogue. Based on that interview, the statement of another (unidentified) employee who told her that Kollar threatened "to beat them up" and a directive from personnel director Wayne Chapman in Leesburg, Formick, on the following day, suspended Kollar "pending investigation" for threatening employees. Claiming the matter was "confidential," Formick refused to give Kollar any details including what she was alleged to have said, who was threatened and where and when it occurred, thereby precluding any response. Four days later, "per Wayne Chapman," Kollar was recalled after being warned that any repetition would result in termination . She was not paid for the four-day absence.

Prior to her suspension, Kollar openly distributed union fliers and prominently displayed a "We Want a Contract Now" sticker on her uniform. She was a long-term employees (10 years) and had never received any warnings or other discipline.

The basic question does not concern the credibility of Kollar vs. Roundsley. Rather, it is whether Formick would so readily have accepted Roundsley's account (an employee who evinced intent to cross a picket line) and have suspended Kollar based thereon absent the latter's known pro-union stance. Having in mind the circumstances described above and BE-P's then ongoing and (as previously found) sometimes unlawful efforts to persuade employees not to strike, I conclude she (and Chapman) simply were not interested in making an impartial inquiry. Instead, they viewed the situation as an opportunity to intimidate Kollar and other union activists on the eve of the anticipated strike. I find the suspension discriminatory in violation of Section 8(a)(3) and (1), as alleged.

Two incidents of unlawful discrimination are alleged to have occurred at the William Penn.

The first involves Ruth Pilarski, a CNA since 1989 and long term president of the facility chapter of local 1199P. She regularly had her 15-minute morning break at 11:00 a.m. and took lunch and afternoon breaks when convenient to residents. This changed in January 1996 when Pilarski was told by her supervisor (Karina Law) to take breaks at set times: 11:00 a.m., 1:00 p.m. and 3:30 p.m. Law also told her that thereafter she would be taking her breaks at the same time as Pilarski. Law told her the change was ordered by facility administrator Leroy Miller because "he had a hard time keeping track of where I was." Miller, however, testified that it was the supervisor who "on occasion" had difficulty locating Pilarski. The change affected Pilarski's ability to participate in union activity on her break times, as her new afternoon break times did not coincide with the other CNAs' breaks.

Taken together with the previously discussed unlawful denial of union access to the facility, removal of union notices from the bulletin board, BHRI's failure to provide specifics concerning purported past problems in locating Pilarski and her status as the principal union representative at the facility, I find the change in her break schedule represents yet another example of management's effort to inhibit union communications with members after expiration of the contract. In this instance the change constitutes unlawful discrimination against Pilarski in violation of Section 8 (a)(3) and (1).

The second alleged discrimination occurred at the William Penn facility, in January 1996, when Respondent BHRI admittedly reduced the working hours of all CNAs from 10 to 8 days per two-week pay period without notice to or opportunity for bargaining with Local 1199P. That unilateral action is included as a violation of Section 8(a)(5) in my prior discussion, as are other such actions at other facilities when, as here, a contract violation is alleged. In addition, I find the reduction in hours, coming as it did shortly after expiration of the contract and accompanied by numerous other unlawful acts, also constitutes a discriminatory attempt to discourage continuing membership in the Union in violation of Section 8(a)(3).

VI. Actions Against LPNs

A. Alleged Bargaining Violations

At Monroeville and Fayette LPNs have been represented in their own unit by Local 1199P since 1987 under separate collective bargaining agreements. Shortly after the agreements expired on November 30, 1995, Respondents' overall personnel manager (Wayne Chapman) sent a comprehensive written revision of the LPN role to, among others, administrators at the two facilities. The revision contained new job descriptions for LPNs that clearly made them statutory supervisors over CNAs; and in a related document, disciplinary policy was changed to provide for punishing LPNs for errors made by CNAs. Pursuant to Chapman's instructions the changes were made effective in January but assertedly only for newly hired LPNs.

These changes were implemented without bargaining or affording the Union an opportunity to bargain.[41] The claimed justification – the management rights clause – did not survive expiration of the contracts, even assuming applicability. See *Buck Creek Coal* and other cases cited *supra* at page 8. Accordingly, Respondent violated Section 8(a)(5) of the Act; and, here, I find that implementation of the changed status on the heels of contract expiration and in light of concomitant unfair labor practices also entails discrimination against LPNs in violation of Section 8(a)(3).

Further, at Fayette, Respondent also violated Section 8(a)(5) by refusing to respond to the Union's February 1 request for information about the changes in LPN status, by admittedly refusing its request for bargaining about them and by admittedly dealing directly with LPNs regarding their changed job duties, all as alleged.

At Grandview, the LPNs were certified on March 11, 1994, and the Board upheld the certification on May 17, 1996. Respondent BE-P chose to test the certification by refusing to bargain. In a memorandum opinion in Docket No. 96-1406 issued on

[41] At **Fayette**, the LPNs were required to attend a meeting on January 15 in which they were instructed that they were, as of that time, supervisors, and were to sign papers indicating their acknowledgment of their changed status.

September 19, 1997, the U.S. Court of Appeals for the District of Columbia upheld the Board's determination that the LPNs were not supervisors and ordered enforcement. In choosing to treat LPNs as statutory supervisors while contesting the Board certification, Respondent acted at its own peril as to any interim unfair labor practices. *Livingstone Pipe & Tube,* 303 NLRB 873, 878-879 (1991), enfd. 987 F.2d 422 (7th Cir. 1993).

Respondent BE-P admittedly changed the hours of LPNs at Grandview in January and at various times thereafter. Also it canceled, albeit in anticipation of the strike, all employees vacations, personal/bonus days, and requested days off without pay until further notice. These actions were taken without notice and bargaining with the Union. Since the LPN unit had long been certified, it was under a clear obligation to bargain with respect to all aspects of their terms and conditions of employment. The unilateral reductions therefore were effected in violation of Section 8(a)(5).

Also charged is Montell's admitted refusal to allow a duly selected LPN (Sue Carbaugh) to serve as Union representative at a labor-management meeting at Grandview set for January 30.[42] Management had previous notice of her selection as Union steward. In a letter dated February 1, Union official Linda Love protested the refusal. The letter elicited no response. The refusal constitutes an interference with the Section 7 right of employees, acting through their union, freely to select their representatives for the processing of grievances and discussion of workplace matters. *Missouri Portland Cement Co.*, 284 NLRB 432 (1987). Accordingly, I find a violation of its bargaining obligation under Section 8(a)(5).

B. Alleged Discriminations – Grandview

1. Higbee

By letter dated December 19, 1995, Local 585 advised Grandview administrator Tamara Montell that LPN Beverly ("Billie") Higbee was one of several facility employees who would represent the Union at bargaining sessions then set to begin on January 9.

On January 6, ADON Teresa Stack told Higbee that she would either be laid off or have her working hours reduced from 64 to 32 per 2-week pay period. At this time there was a complement of 16 LPNs at the facility, Higbee ranked fourth in overall seniority. When she asserted her seniority, Stack said she would ask Montell. Shortly thereafter Montell approached Higbee and told her she would "call corporate" about the matter. Five days later (January 11) Stack told Higbee that management had decided immediately to reduced her hours to 32 per pay period and that in reaching the decision "they" had considered job performance as well as seniority. Higbee was never told about any deficiency in her work. In fact, in all of her previously issued written evaluations going back to 1989 her performance were rated either outstanding or very good. At the time two other LPNs (both with less seniority than Higbee) were placed in layoff status and another two had their hours reduced.[43]

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[42] The decision was made after Montell consulted with BE-P's labor relations manager in Leeburg. Significantly, It was not based upon opposition to the Board's certification decision. Rather, a subpoenaed document (GCX 120) gives as the reason: "LPNs do not have a union contract at **Grandview** . . . [and] she [Carbaugh] was never appointed as Union Steward." In fact, Carbaugh was the designated steward and in that capacity had attended a third step grievance meeting on January 4.

[43] Higbee voluntarily resigned effective on March 30. On an exit interview form dated April 4 the following entry appears over administrator Tamara Montell's signature: "Poor work quality.

Continued

In these circumstances, having in mind Respondent's previously discussed (in Subsection III) contemporaneous denial of union access to the Grandview facility (including its bulletin board), failure to provide relevant information requested by Local 585 and unilaterally curtailing working hours of a number of employees (including Higbee), I find Higbee's reduction also involved a violation of Section 8(a)(3) because it was intended to discourage her, and others, from continuing to support the Union; and there is no showing that she would have been selected for reduced hours at the time absent her Union involvement. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 445 U.S. 989 (1982).

2. Proper

Like Higbee, Proper had worked as a LPN at Grandview for over 8 years, had actively and openly supported the LPN organizing drive by wearing union buttons at work and hosting union meetings in her home,[44] had received work performance ratings of satisfactory or better in all of her yearly evaluations through 1995 and had received no reprimands or other disciplinary actions prior to January 1996.

On January 4 Proper went by the nurses' station where the RN on duty was upset because a resident needed an x-ray and she was having difficulty arranging for an on-site x-ray by a private contractor. Proper offered a suggestion: why not sent the resident to a hospital for the x-ray? The nurse turned and said: "I can't do that because our census is low." Proper inquired: "Since when can we not send a patient into the hospital because our census is low?" No answer was given.

On the following day DON Huffman called proper into the office and handed her a completed disciplinary form in which (1) she was cited for telling an associate that "a resident was not sent to the hospital due to low census and that the family was made aware of this," (2) given a 3-day suspension and (3) warned that "Any [emphasis Huffman's] violation of policy/procedure governing Beverly Ent. and Grandview Health Care will result in termination immediately."[45] Huffman did not testify about the matter so I have no way of knowing the extent of her investigation and whether statement attributed to Proper came from the RN or someone else who may not have been present when the incident took place.[46] Also I note that while the form cites a prior disciplinary

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Do not rehire. Poor NSG skills." Montell unequivocally states the comment was not on the form when she signed it and she claims no knowledge as to who wrote it. On the other hand, ADON Stack admits authorship, claiming to have done so prior to Montell's signing the document. Higbee was never told of the comment. Further, neither Montell nor Stack deny making the January 6 through 11 statements attributed to them by Higbee. Curiously, there is another exit interview form dated April 17 and signed by facility DON Angela Huffman that gives "lack of *shift* seniority" as the only reason for Higbee's having been selected for reduction in working hours.

[44] During the 1994 organizational drive a former administrator of the facility (Sharon Provonovich) asked Proper to report the names of informational pickets. Proper declined, telling Provonovich that she was for the Union.

[45] According to credited testimony of Proper, Huffman at the same time orally accused her of having previously made another "false accusation" that there had been undue delay in caring for a resident whose hands were cut by broken glass. No prior mention of that matter had been made, no details were provided and no discipline was imposed.

[46] Respondent moves to strike an assertion in General Counsel's brief that the suspension "violates the Act," terming it a *sub silentio* effort to amend the complaint. The motion is denied. Though not alleged (nor found herein) to be a violation, the suspension nevertheless is relevant

Continued

violation by Proper on May 11, 1995, neither it nor the record herein provides any details.[47]

Responding to an emergency bell on Sunday, February 25, Proper provided assistance to CNA Ginny Lawrence in moving a resident onto a commode. On leaving the room Proper met assistant facility administrator Jackie Shaffer who took her to another area and told her to keep an eye on Ginny "because she was out of sorts."

On the following day Huffman called Proper at her home and asked her to "write up" Ginny for yelling at the resident. Proper refused stating that Ginny had not yelled at the resident. At the time Ginny Lawrence was the union steward for CNAs at the facility.

On March 11 Proper was called to the office of the administrator where DON Huffman, in the presence ADON Stack, handed her another completed disciplinary form and told her she was terminated. That action had been preapproved by administrator Montell and, in Leesburg, VA, by personnel director Chapman. All information on the form had been written by Stack. Huffman disclaims having direct knowledge of any of the incidents described therein.

Six incidents are cited in the form. These are considered *seriatim* below. According to Proper's credited and undisputed testimony she was not asked to give her version of the incidents either at the termination interview or at anytime prior thereto. Indeed, except for item 6, she was not contemporaneously told that she had done anything wrong.

Three of the incidents occurred on March 4. The first involves a doctor's order that a resident's respiration rate be monitored every two hours and be given morphine whenever the rate was lower than a certain level. Proper checked every two hours and, the rate being consistently below level, she administered morphine every two hours each time recording having done so in the "Medex" log. However, due to a heavy workload she was unable also to record the resident's respiration rate on a "flow sheet" as instructed by Stack. At the end of her workday Proper passed on Stack's instruction to a nurse on the next shift but the latter also failed to fill out the flow sheet. There is no indication that anyone was disciplined for that omission.

The second incident involves narcotics counting. When Proper began her shift normal procedure was to perform a joint count of narcotics with the departing responsible LPN. On March 4, however, the LPN had left early having simply signed a blank page in the narcotic's logbook. Proper entered the count by herself and then informed her RN supervisor (Betsy Hydak) that she had done so. When her shift ended Proper made the count jointly with a relief LPN and discovered a disparity that she promptly reported to Stack. The latter checked the form and found that the disparity resulted from a subtraction error. Proper accepted blame for the error stating that she had made the count without assistance.[48] Stack simply pointed out that she should have made certain of the count before signing, thereby to avoid possible responsibility for any missing narcotics. She gave no indication that disciplinary action would be taken. Stack could not recall whether any discipline was meted out to the LPN who signed the blank

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because it is claimed as a progressive step leading to the ultimate discharge of Proper.

[47] In its brief, Respondents mistakenly attribute to May 11 testimony relating to March 4.

[48] Stack testified that Proper assured her that she had done the count jointly with the cosignatory LPN. In so doing she apparently did not recall having written in the disciplinary form given to Proper on March 11: "3-3-96 Sharon reported to me that she never counted the narcotics with 11-7 shift [stating] that she [the other signatory LPN] just signed the book [in blank]."

page.

The third incident concerns giving morphine to a resident. According to Proper, a doctor had called in on March 4 and told her to administer doses sublingually, she wrote the order down, confirmed it with the doctor, and carried it out. In her testimony and in the disciplinary form given Sharon on March 11, Stack claims that the doctor called in upset that Proper had written on the order "SL" (sublingual) rather than "SQ" (subcutaneous). As noted above, Stack did not approach Proper about the matter prior to issuance of the discipline form on March 11.

A fourth incident occurred on March 1 when Proper clocked out 20 minutes after her shift had ended, contrary to a policy change announced in February that required prior approval of all overtime. Asked whether at any time prior to issuance of the disciplinary citation on March 11 she gave Proper an opportunity to explain why prior approval was not obtained, Stack replied (tr. 809): "No, but that doesn't matter. It has to be approved [even] if there was a problem or emergency . . . ." There is no indication that anyone else was ever disciplined for a similar infraction.

Proper is also cited for taking 5 to 10 breaks during her 8-hour shifts. Stack was so informed by a supervisor (RN Karen Baker) and she opted to accept that report. No one (including Baker) had brought the question of excessive breaks to Proper's attention prior to March 11.[49]

The sixth and last incident cited in Proper's termination occurred on March 3. Proper testified that on reporting to work that day she was told by the departing RN shift supervisor that a resident had tried to climb out the bottom of her bed and that "when they pulled her back, her leg twisted." In making her rounds Proper noted that the resident was very restless. She called supervisor (RN Hydak) who came an examined the resident. Proper convey to Hydak what the departing RN had told her. The resident was sent to a hospital where she was diagnosed as having a dislocated hip.

According to Stack, Hydak told everything to her on the following day. Concerned that no one on the 11-7 shift had reported a situation that might involve misconduct, Stack inquired of the charge nurse on that shift. The latter (who is unidentified and did not testify) assertedly told Stack that neither she nor other staff had any involvement in the resident's injury and that all she told Proper was that the resident had injured herself while attempting to move herself further up in the bed. Accepting that explanation, Stack confronted Proper and accused her of providing false information to supervisor Hydak. Proper next heard of the matter on March 11 when she was cited for making a "false and inaccurate" report.

Although Stack denies awareness that Proper was a Union supporter her supervisors (Hoffman and Montell), both of whom participated in the discharge decision, did not. I find that all of them were well aware of Proper's membership. She participated actively and openly in the LPN organizational drive at Grandview, had expressly told the prior administrator that she supported the Union, wore a union button on the job and had, on February 26, refused Huffman's request to demonstrate allegiance to the company by exercising a supervisor's function and writing-up the CNAs' union steward. Indeed, even apart from those circumstances it would be incredible in light of the smallness of the unit (16 LPNs) and Respondent's long and continuing opposition to recognition, if management *did not know* where she stood.

[49] Stack's testimony about this matter was contradictory and highly defensive (Tr. 810-812).

Having in mind Proper's unblemished record as an LPN at Grandview, the pattern of unlawful anti-union conduct occurring at that facility around the time of her alleged derelictions (including LPN Higbee's suspension), I infer that the disciplinary actions were taken at least in part because Proper was a known and active Union supporter.

Accordingly, Respondent has the burden of showing that the same actions would have been taken in any event. *Wright Line*, *supra.* It has failed to do so. None of Respondent witnesses made an attempt to justify or even address the circumstances leading to the initial disciple given Proper on January 4; and with respect to the six incidents for which she was cited and discharged for on March 11, all occurred a week or more before that time and appear to have been "stockpiled" with a view to justifying a discharge decision. Proper was not given any contemporaneous indication that formal discipline was to be taken or given an opportunity to explain. Moreover, Stack's "investigations" appear cursory at best and characterized by instant willingness to accept claims of misconduct against Proper.

I conclude that, as in the case of LPN Higbee, Proper was written-up, suspended and terminated to punish her for continuing to support the Union at a critical time and to deter others from doing so, in violation of Section 8(a)(3).

C. Status/Treatment of LPNs – Haida

LPNs at Haida are not represented by a union of their own.

Diane McNulty was employed at Haida as an LPN for 9 years, from 1987 until her discharge on March 9, 1996. McNulty worked full-time on the daylight shift.

McNulty had been actively involved in efforts to organize the LPNs at Haida. She attended a meeting with the Union organizer at the local library, signed a Union authorization card, participated in a "march on the boss" with a demand for recognition, wore badges and pins with Union insignia, and served as a member of the Union's bargaining committee negotiating a contract for the service and maintenance unit.

About March 4, 1996, McNulty made a request for a schedule change so that she could attend contract negotiations. The request was denied solely on the basis that the LPNs were not in the Union.

On March 9, 1996, McNulty was summoned to the office where administrator Pauline Formeck told her that effective immediately she was prohibited her from discussing the Union at any time and from wearing Union insignia. McNulty agreed to remove Union insignia, but asserted she would continue to discuss the Union on breaks. As a result, McNulty was immediately suspended and subsequently received a discharge letter, effective March 9.

Shortly thereafter Sara Sharbaugh was called to the office and the same scenario was repeated. Sharbaugh had been employed at Haida as an LPN for 13 years. Like McNulty, Sharbaugh had been actively involved in efforts to organize the LPNs at HAIDA. She agreed to remove Union insignia and refrain from talking about the Union, but was unwilling to make forsake Union activities. She too was immediately suspended and subsequently received a discharge letter.

During the course of the day all other LPNs (approximately 18) were called to the office individually and given the same restrictions. Each promised to comply.

The interviews were conducted and the discharges were effected by directive of Wayne Chapman.

The parties agree that the legality of Respondent BE-P's denying McNulty a schedule change, interrogating the LPNs, and discharging McNulty and Sharbaugh is dependent on the status of the LPNs at Haida. If they are statutory supervisors, the actions are lawful because the LPNs are outside the protective aegis of the Act. If, on the other hand, they are employees the actions violate rights protected under the Act. That question is considered below.

Under Section 2(3) of the Act, "[t]he term 'employee'. . . shall not include . . . any individual employed as a supervisor . . . . " Under Section 2(11), a "supervisor" is defined as:

> **any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.**

The Haida facility is a one story building divided into 4 wings, referred to as A, B, C and D, radiating off a central area. There are about 102-104 beds divided fairly equally among the 4 wings.

On the day shift, the following nursing management are present in the facility: the Director of Nursing (DON), the Assistant Director of Nursing (ADON), the RN charge nurse, and the facility Administrator Formeck. The RN charge nurse is assigned to the nurses' station and does not perform hands-on resident care. Also on the day shift, there are 3 LPNs, one assigned to A and D wings, one assigned to B wing and one assigned to C wing. The LPNs rotate through the wings on a periodic basis, either biweekly or monthly. Finally, on the day shift, there are 10 CNAs, assigned 2 per wing and 2 in the shower room.[50] The CNAs bid on their jobs under the contract..

On the second shift, there are the following personnel: the ADON/Director of Staff Development; the RN charge nurse, stationed at the nurses' station; 3 LPNs assigned to A/D wings, B wing and C wing; and 8 CNAs assigned 2 per wing.

On the third shift, there are the following personnel: the RN charge nurse stationed on B wing; one LPN assigned to A/D and C wings; and 4 CNAs assigned in pairs, with one pair on A and B wings and the other pair on C and D wings.

Typically, on the first shift, an LPN would spend her workday as follows:

> **7:00-7:15 a.m. – report**
> **7:15-9:30 or 10:30 a.m. – pass medications**
> **15 minute break**
> **paperwork or treatments**
> **11:00-11:30 a.m. – lunch**
> **11:30 or 12:00-1:00 – pass medications**

[50] There is also a restorative aide working on the first shift. The record does not disclose to whom the restorative aide reports.

1:00-2:30 – treatments
15 minute break
2:45-3:30 charting

Similarly, on the second or third shift, an LPN would spend 5 hours passing medications, one hour giving treatments and 2 hours charting.

The LPNs are paid hourly, punch a time clock and are paid overtime.

According to undisputed and credited testimony, including witnesses (LPN Mary Noel and CNA Lolita Roundsley) called by Respondent, LPNs have no involvement in many decisions typically reserved to supervisors. Thus LPNs do not train the nurses aides to become certified, do not conduct orientation for the new CNAs, do not pair new CNAs with experienced CNAs as part of the orientation process. (McNulty: 1847; Sharbaugh: 1885; Linda Bernard: 2068; Noel: 2137). LPNs do not make up the schedule for the CNAs, do not assign CNAs to work on particular wings, are not involved in awarding of CNA jobs as part of their contractual bidding process, and do not tell CNAs which residents they are to care for.[51] (McNulty: 1849; Sharbaugh: 1886-1887; Ada Livingstone: 1958-1959; Darlene Prosser: 1974, 1976: Roundsley: 2116-2117). LPNs do not permanently, or temporarily, transfer CNAs to different departments, different days, different shifts, or even different wings. (McNulty: 1848; Sharbaugh: 1886; Noel: 2138) LPNs do promote CNAs or recommend CNAs for promotion. (McNulty: 1848; Sharbaugh: 1885)

LPNs do not assign the breaks and lunch times to the CNAs.[52] They do not assign the CNAs such tasks as filling water pitchers and passing nourishments. (McNulty: 1851; Sharbaugh: 1889-1890; Livingstone: 1959; Prosser: 1976; Roundsley: 2118)

LPNs do not approve CNA requests for vacation or other time off. They do not decide if CNA absences are excused or not and they do not have access to attendance records for CNAs. If there are calloffs, LPNs do not decide whether to replace the absent CNAs or to work short staffed. LPNs are not involved in obtaining replacement CNAs to cover for calloffs. LPNs do not assign or approve CNA overtime. (McNulty: 1850-1852; Sharbaugh: 1888, 1890; Livingstone: 1958; Prosser: 1975; Roundsley: 2116-2117; Noel: 2139-2140) LPNs do not initial the time cards for CNAs if the time clock malfunctions or if CNAs forget to punch in or out. (McNulty: 1856; Sharbaugh: 1891; Livingstone: 1959; Prosser: 1977; Roundsley: 2118; Noel: 2142)

LPNs do not answer grievances filed by CNAs and are not provided a copy of the contract covering the CNAs by management. (McNulty: 1852; Sharbaugh: 1890; Noel: 2140). Nor do they lay off CNAs or recommend CNAs for layoff, recall CNAs from layoff or recommend CNAs for recall. They do not grant CNAs raises or other financial rewards or make recommendations for such rewards. (McNulty: 1850; Sharbaugh: 1887; Noel: 2139) LPNs do not complete accident or injury reports for the CNAs. (McNulty: 1856; Sharbaugh: 1891)

LPNs do not substitute for the RN charge nurse, ADON or DON, if any of these individuals is absent from the facility.[53] (McNulty: 1856; Sharbaugh: 1891). LPNs do not

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[51] The CNAs themselves decide among themselves which residents each will care for.

[52] A schedule of CNA break and lunch times is posted at the nurses' station.

[53] Although LPN Noel testified that she substituted for the RN charge nurse, on cross-examination, Noel admitted that this "substitution" occurred only when the RN was on lunch break and that an RN was always present in the facility.

attend management meetings at which strategy for the collective bargaining negotiations was planned. They did not attend management meetings at which strategy for the strike was planned and they were not given a copy of the strike contingency plan. They are not authorized to make purchases on behalf of the facility. (McNulty: 1856; Sharbaugh: 1891-1892; Noel: 2143[54])

With respect to hiring, the record is clear that the LPNs had no involvement in the hiring of CNAs before the spring of 1996. (McNulty: 1846; Sharbaugh: 1884; Jane White: 1931, Depto: 2041) DON Settlemeyer admitted that it was only shortly before the strike that LPNs were first assigned any responsibilities in connection with hiring. [55] (Settlemeyer: 2230) Even then, as credited testimony set forth below makes clear, the LPNs did not hire CNAs or make effective recommendations as to the hiring of CNAs.

Specifically, McNulty in 9 years of employment with Respondent had no involvement in the interviewing or hiring of CNAs. However, in about early March 1996, McNulty was directed by ADON Nancy Pietak to participate in two interviews.[56] McNulty understood that Pietak had independently interviewed the two applicants, and indeed, the ADON was also present for part of the time when McNulty met with the applicants. McNulty made no written report of the interviews. She was asked by the ADON if she recommended hiring the applicants and McNulty answered yes. McNulty did not know if the applicants were hired, and the record does not reveal whether that was the case.

In addition, LPN Depto in her 6 years of employment at the facility before the spring of 1996, had never interviewed anyone. In March of 1996, she was directed to participate in two interviews, one conducted by the Pietak ADON and another conducted by an RN charge nurse. Depto was directed to complete a form giving her recommendation on hiring. In both cases, Depto recommended hiring the applicants. However, Depto was never informed whether the applicants were hired and, subsequently, Depto never saw either applicant working in the facility.

Similarly, LPN Jane White during her 13 years of employment at the facility before the spring of 1996, she did not participate in CNA interviews. However, in the spring of 1996, White was directed to participate in two interviews, and provided with a list of questions for her use during the interviews. White was not asked to make a hiring recommendation. About 2-3 weeks later, she was asked to complete a recommendation form for one of the applicants. By that time, that applicant had already been hired and was working at the facility.

Several CNAs, including one called by Respondent, also testified about their interviews, hiring and orientation. They uniformly testified that no LPN was involved in their interview, or subsequent orientation. (Livingstone: 1956-1957; Prosser: 1973-1974; Roundsley: 2115)

In view of the above, I find the LPNs had no authority to hire or effectively to recommend hiring CNAs. Certainly in this area the LPNs have not exercised independent judgment as required in Section 2(11). To the contrary, the evidence discloses that the purported participation of the LPNs in the hiring of replacement employees was little

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[54] Noel admitted that the only meetings she attended to prepare for the strike were ones at which staffing was discussed.

[55] She further testified that a much earlier attempt to involve the LPNs in interviewing was abandoned.

[56] The timing of the interviews indicates that Respondent was hiring replacements in anticipation of the strike.

more than a sham.

LPNs are assigned to evaluate the CNAs on an annual basis, or upon the completion of a probationary period. The LPN receives an evaluation form with the name of the CNA on it. Since the LPNs are not granted access to the CNA personnel records or attendance records,[57] typically the ADON either completes the sections of the evaluation dealing with attendance issues and prior discipline before giving the form to the LPN, or the ADON attaches a "post-it" note to the evaluation which includes notations on attendance and prior discipline that the LPN is to write on the form. After the LPN completes the form, it is returned to the ADON for her approval. During the ADON's review, the LPN may be directed to make changes.[58] After the ADON approves the evaluation, the LPN presents the evaluation to the CNA. (McNulty: 1852-1856; Christine Parrish: 1941-1942, 1950-1951; Anita Selfridge: 2004-2034; Linda Bernard: 2061-2063). In this regard, I note that even the witnesses called on behalf of Respondent, LPN Noel and DON Sedlemyer, did not dispute these procedures. (Noel: 2145-2156; Sedlemyer: 2209-2212)

Evaluations completed by the LPNs clearly reveal substantial input from the ADON in the process: each evaluation includes the ADON's[59] written comments, her signature, or both. (GCX 344- Helen Davidson; GCX 345-Karen Stasko; GCX 346-Shirley Magulick; GCX 347-Mary Cence; GCX 348-Helen Thomas; GCX 349-Esther Onderko; GCX 350-Terry Thomas; GCX 351-Karen Panaro; GCX 352- Karen Michaels; GCX 353-Jancie Holland; GCX 354-Gerald Michaels)

Long-standing Board precedent holds that when, as here, charge nurses perform evaluations that do not, by themselves, affect other employees' job status, [60] the charge nurses are not supervisors. *Ten Broeck Commons,* 320 NLRB 806, 813 (1996); *Manor West, Inc*., 313 NLRB 956, 959 (1994); *Providence* Hospital, 320 NLRB 717, (727-730 (1996); Beverly *Enterprises – Ohio d/b/a Northcrest Nursing Home*, 313 NLRB 491, 498 (1993); *Ohio Masonic Home*, 295 NLRB 390, 393 (1989); *Passavant Health Center*, 284 NLRB 887, 891 (1987); *Eventide South, A Division of Geriatrics, Inc*. 239 NLRB 287, 288 (1987; *McAlester General Hospital*, 233 NLRB 589, 591 (1977). Moreover, the ADON reviews the evaluations completed by the LPNs and changes those items that the ADON believes do not accurately reflect the work of the CNA. *Ten Broeck Commons*, *supra* at 813.

With respect to discipline, clearly before 1996 LPNs played virtually no role in the discipline of the CNAs. For example, LPN McNulty in her 9 years of employment at Haida

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[57] It was only shortly before trial that the LPNs were directed to review the CNA personnel files and attendance records themselves.

[58] LPN McNulty was directed by the ADON to change a numerical score and did so; and whenever LPN Anita Selfridge wrote comments on an evaluation, the ADON gave the evaluation back to her and directed her to redo it.

[59] Most of these evaluations include the comments and signature of the current ADON (Pietak), some have the comments and signature of the former ADON, Nadine Kirsch.

[60] Indeed the value and utility of CNA evaluations at **Haida** are severely circumscribed because CNAs are covered by a contract. Thus, evaluations do not form a basis for a wage increase or other financial reward since those items are controlled by the contract. Nor are evaluations the basis for adverse employment actions such as transfers to a different position since the contract contains a procedure for bidding on jobs. Moreover, administrator Formack admitted that no CNA has ever been terminated based upon a poor evaluation; and Respondent offered no evidence of an evaluation being used as a basis for any personnel action.

had never written up anyone and did not know where the discipline forms were kept. Similarly, LPN White in her 13 years was never involved in any discipline of a CNA.

After the strike, however, when an RN charge nurse wrote up two CNAs for their failure to empty the Attends barrel, she directed LPN White, who had not observed the incident, to sign the discipline as a witness. LPN Bernard had the same experience when, again after the strike, ADON Pietak wrote up another two CNAs for failing to pull a privacy curtain. After signing Pietak directed Bernard to sign the write-ups as well and to present them to the CNAs.

In her 4 years of employment before the strike, LPN Parrish participated in 3 write-ups, but in each case the decision to issue discipline was made by someone higher in management, such as the RN charge nurse, ADON or DON.

However, since the strike Parrish has participated in 4 write-ups. One involved a Foley bag left on the floor. Parrish advised the RN charge nurse, who then consulted with the DON Settlemyer. She directed Parrish to write-up the CNA at fault, Kathy Barnosky. On another occasion Parrish discovered that a CNA (Karen Powers) had failed to put a resident in a wheelchair. Parrish first discussed the matter with the RN charge nurse who assisted Parrish in drafting the write-up. Parrish checked the box on the form indicating that this was a written warning, but was directed by the RN charge nurse to reduce the discipline to an oral warning. In the third situation Parrish was directed to issue this write-up by the RN charge nurse, who told her what to write on the form stating: "I'm really sorry Chris, but Nancy [ADON Pietak] specifically said you had to do this." The fourth situation involved write-ups of two CNAs for soiled linen. Subsequently, the DON Settlemyer conducted her own independent investigation of the incident and determined that there was insufficient evidence to support the imposition of any discipline.

During her 13 years of employment at Haida, LPN Selfridge had never written up any CNA. However, since the strike, Selfridge was involved in 3 write-ups. In one, ADON Pietak directed her to sign write-ups for 2 CNAs (Margaret Moore and Donna Ziblinsky) for failing to pull privacy curtains. Selfridge had not observed the incident and Pietak did the write-up but directed Selfridge to sign and present them to the CNAs. On the second occasion, Selfridge could recall only writing up CNA Chloe Ludwig for something and that Pietak also signed. The third occasion involved a resident who fell while in the care of CNA Betty Lechine. Selfridge did so, but what she wrote did not please Pietak. The latter called her to the office and with Settlemyer present ordered her to rewrite and told her what to write. Thereafter, Selfridge was disciplined herself, for her failure to properly issue the discipline to the CNA.

Four other write-ups by LPNs were produced by Respondent in response to subpoena. Each on its face shows significant involvement of Pietak and Settlemyer in the write-ups. Further, only one was issued before the strike, on March 13, 1996.

As detailed above, the LPNs' role in the disciplinary process prior to the March 9 alleged discriminations against them was insignificant at best; and despite the subsequent efforts to clothe them with responsibility for write-ups, it is abundantly clear that even then LPNs were not permitted effectively to impose discipline or to recommend its imposition.

The Board has consistently held that in order for the charge nurse's discipline to confer supervisory status, the discipline must lead to personnel action, without the independent investigation or review of other management personnel. *Ten Broeck*

***Commons*, *supra* at 812; *Manor West, Inc.*, *supra* at 958; *Northcrest Nursing Home*, *supra,* at 492-498, 505 -507; *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 392 (1989); *Passavant Health Center*, *supra* at 889. As is readily apparent in the instant case, the LPNs do not exercise independent judgment in the imposition of discipline.**

With respect to the nature of direction LPNs provide over the work of the CNAs, the evidence leaves no doubt that the LPNs provide only routine direction to the CNAs and do not responsibly direct the work of the CNAs. This conclusion is borne out in the testimony of all of LPNs, including the two (Mary Noel and Faye Lenglet) called by the Respondent, as well as by the testimony of the ADON/Director of Staff Development, Paula Lloyd,

The standing operating procedure is as follows:

Each day, beginning on the first shift, there is a sheet prepared by the RN charge nurse listing each resident, by wing. The particular care requirements for each resident, such as the need to take a temperature, monitor input and output of liquids, monitor stools, take vital signs, remove a splint, or monitor a cough, are noted on the sheet. Information that remains constant is merely Xeroxed from the master sheet, while other information is written by the RN charge nurse and some information is written by the LPNs; the CNAs fill in various blanks indicating such things as if the resident moved her bowels. Based on information from report, the LPNs relate the particular resident care requirements to the CNAs who are actually responsible for performing basic tasks. As noted, the LPNs spend the bulk of their workday performing hands-on resident care. While the LPNs are working on the floor, the CNAs report unusual resident conditions to the LPNs who either deal with the situations themselves or if the conditions are more serious, report the matter to the RN charge nurse. (McNulty: 1862-1863, 1873-1876; Sharbaugh: 1892-1896; Parrish: 1946-1948; Selfridge: 2006-2008; Bernard: 2056-2058; Noel: 2132-2134; Lenglet: 2270-2272; Lloyd: 2280-2283, 2290-2291)

Typically, LPN McNulty informs the 2 CNAs on her wing of any particular care requirements when she passes medications in the morning. During the day, she asks CNAs how things are going, and in order for her to complete her paperwork, she also asks them for specific information or reviews paperwork of the CNAs. If CNAs have questions or if she observes them doing something incorrectly, she shows them the correct way to perform the task, such as the proper way to make a bed or the proper way to lift a resident. Sharbaugh conveys resident care information to the CNAs in a manner similar to McNulty. She also explained that CNAs report unusual resident conditions, such as an elevated temperature, a bruise or a bed sore, to her, and that she would pass this information on to the RN charge nurse.

In determining whether the direction of work by charge nurses satisfies the statutory mandate of Section 2(11) of the Act, the Board decides whether such direction requires the use of independent judgment or whether such direction is merely routine. *Ten Broeck Commons*, *supra* at 807. In that case, the Board summed up evidence relating to duties of CNAs *vis a vis* LPNs, as follows:

> **The essential duty of the CNA is to take care of elderly people who are no longer able to care for themselves. For the most part, such duties require little skill, are repetitive, and at times even unpleasant.**
>
> **Every day, CNAs must perform the same care, in the**

> **same manner, for the same people. To be sure this is done, the Employer requires that each patient's particular needs be kept in the Aidex. It is the responsibility of the CNA to consult and follow the Aidex with respect to each patient and perform all functions indicated for each resident.**
>
> **One of the LPNs' responsibilities is to be sure that the CNAs are properly performing their jobs. Thus, LPNs make patient rounds and consult the Aidex. If an LPN sees a patient that needs attending to or a job that has not been properly done, the LPN will call it to the attention of the CNA. This type of direction does not require the independent judgment of Section 2(11). (at 811)**

That summary is equally applicable to the situation presented in the instant case, and impels the same conclusion, i.e. that the LPNs' direction of the CNAs herein does not require exercise of independent judgment.

Finally there is the matter of job description given LPNs. Read in the abstract, the most recent description clearly endows them with independent authority characteristic of statutory supervisors. The reality however, as shown on this record, is that they never have had nor have they ever exercised such authority. This is seen in the matter of evaluations and discipline analyzed above. In reality, the written descriptions merely make it appear that the LPNs are supervisors, when they are not.

Specifically, I note that item 2 of the job description recites that an LPN "receives the preceding shift report, informs and updates staff, and relays report to on-coming shift." In fact it is the RN charge nurse who prepares the sheet and it is the RN charge nurse who gives reports to the next shift. Moreover, in relaying resident care information to the CNAs, the LPNs are merely functioning as a conduit, relating what is set forth on the sheet.

Another example is item 20 which recites that an LPN "has responsibility for direct administrative and technical supervision of nursing unit; is in charge of unit with a registered nurse on call and located within a 30 minute drive of the facility," whereas in practice there is always a registered nurse on duty in the facility who invariably exercises that responsibility. Again, item 24 states that an LPN "is responsible for assisting in the orientation and training of new nursing personnel." As the testimony of every LPN cited above makes clear, the LPNs have no involvement whatsoever in the training or orientation of the new CNAs.

Further, item 26 positions the LPN as the one who "prepares written job performance evaluations that are revised and completed by the supervisor and the DNS [Director of Nursing Services] and are relied upon for transfers, wage increases, assignments and/or terminations." As detailed above, higher management regularly revised the evaluations performed by LPNs; the significance of evaluations is sharply diminished by provisions in the contract. A review of the other elements of the job description reveals that they fare no better than the items analyzed above.

It is well established that proper determination of the status of charge nurses is contingent upon whether they actually perform supervisory functions, and that a grant of authority on paper, which is in practice illusory because it is never exercised, is not sufficient to make a charge nurse a supervisor. *Eventide South*, *supra at* fn. 3; *Pine Manor Nursing Home*, 238 NLRB 1654, 1655 (1978); *North Miami Convalescent Home*, 224

Considering the above and the record as a whole, clearly the LPNs at the Haida facility are not shown to be supervisors within the meaning of the Act.[61] I find them entitled to all the protections accorded employees under the Act. Accordingly, Respondent BE-P violated Section 8(a)(1) by prohibiting them from talking about the Union, by prohibiting them from wearing Union buttons and insignia anywhere in the facility, and by interrogating them about their Union sympathies. Further, Respondent violated Section 8(a)(3) by refusing to allow LPN Diane McNulty to change her schedule to attend contract negotiations, and by discharging her and Sara Sharbaugh because they would not renounce their support for the Union.

D. Alleged Unlawful Insignia Prohibition – York

There remains one other allegation of unlawful action with respect to LPNs. In July 1995, LPNs Christin Krusnosky and Catherine Verdier voted for representation of LPNs at York by Local 1199P and both had made known their stance by wearing pro-union stickers while on duty at the facility.

On February 14, they were called into the office where DON Caroline Nelson, after telling them that as LPNs they were not eligible for union membership, ordered them immediately to remove union stickers from their uniforms. Although they promptly complied, Verdier commented that when recognition came "we're going to wear them [again]." Nelson replied "Well maybe, [adding, *sotto voce,* as there turned to leave] if you're still here." Respondent BE-P chose not to call Nelson as a witness.

As in the case of LPNs at Haida, if the LPNs at York were not supervisors they had a right to wear union insignia and Respondent's action in ordering them not to do so violated that right.. Since their unit was certified on August 27, and the Board upheld the certification on September 23, 1996,[62] I find a violation of Section 8(a)(1).

VII. Sufficiency of Strike Notices Under Section 8(g)

Section 8(g) was added to the Act in 1974 as part of the Nonprofit Hospital Amendments that extended coverage to include health care institutions. It provides, *inter alia*, that a union must give 10 days written notice of a strike against such institutions. The 10-day notice, according to Congressional Committees sponsoring the legislation,[63] was intended to give them sufficient advance notice of a strike or picketing to permit timely arrangements for continuity of patient care.

In this case, the Unions on March 14 and 15 sent to administrators of 15 of the involved nursing homes[64] and the Federal Mediation and Conciliation Service notices advising that a strike would occur at those facilities on March 29. It is conceded that those notices fully comply with Section 8(g).

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[61] It is well established that the burden of proving supervisory status is on the party asserting it. *Chevron, U.S.A.*, 309 NLRB 59, 62 (1992), enfd. mem. 28 F. 3d 107 (9th Cir. 1994); *George C. Foss Co*. v. *NLRB,* 752 F. 2d 1407, 1410 (9th Cir. 1985); and *Tucson Gas & Electric Co*., 241 NLRB 181, (1979).

[62] A complaint issued on January 31, 1997, as amended April 15, 1997, in Case 4-CA-25579 alleging a refusal to bargain with the new LPN unit in violation of Section 8(a)(5) of the Act.

[63] S. Rept 93-766, 93d Cong., 2d Sess. at 4; H. Rept. 93-1051, 93d Cong., 2d Sess. at 5.

[64] **Monroeville, Clarion, Fayette, Franklin, Haida, Meadville, Meyersdale, Mt. Lebanon, Murray, Richland, William Penn, Reading, Lancaster, Caledonia** and **Carpenter**.

On March 27, however, other letters were sent to the same addressees advising that the Unions had extended the strike deadline by 72 hours, from 7:00 a.m. March 29 to 6:00 a.m. Monday, April 1. Respondents contend that the extension of the strike notices does not comply with "clear and unambiguous language" in the concluding sentence of Section 8(g), to wit: "The notice, once given, may be extended by the written agreement of both parties." Since, admittedly, the Unions' action in extending the deadline was taken unilaterally, Respondent's argue that the subsequent 3-day strike commencing on April 1 was unlawful and, consequently, that they were under no constraint to take back the approximate 450 employees who participated – even assuming the strike was in protest against unfair labor practices.

That precise issue was presented and resolved in the "*Bio-Medical"* case, *Greater New Orleans Artificial Kidney Center*. 240 NLRB 432 (1979). There the Board, after citing the following language in the Congressional Committee Reports:[65]

> **It is not the intention of the Committee that a labor organization shall be required to commence a strike or picketing at the precise time specified in the notice; on the other hand, it would be inconsistent with the Committee's intent if a labor organization failed to act within a reasonable time after the time specified in the notice. Thus, it would be unreasonable, in the Committee's judgment, if a strike or picketing commenced more than 72 hours after the time specified in the notice. In addition, since the purpose of the notice is to give a health care institution advance notice of the actual commencement of a strike or picketing, if a labor organization does not strike at the time specified in the notice, at least 12 hours notice should be given of the actual time for commencement of the action . . .**

went on to adopt the 72-hour window and 12-hour advance notice rule as a parameter for allowing extensions of strike times previously announced in notices issued under Section 8(g). In this regard, it held that the rule established a reasonable "substantial compliance" standard needed to avoid an application of Section 8(g) that would produce "an unwarrantedly harsh result [i.e. depriving strikers of protected status] not intended by the Congress."

The *Bio-Medical* precedent has been uniformly followed by the Board since 1979. *District 1199-E National Union of Hospital and Health Care Employees (Federal Hill Nursing Center, Inc.),* 243 NLRB 23 (1979); *Bricklayers & Allied Craftsmen, (Lake Shore Hospital),* 252 NLRB 252 (1980); *Nurses Ana (City of Hope),* 315 NLRB 468 (1994).

In light of the clear and consistent precedent set by *Bio-Medical* and its progeny, any change of interpretation in this area is matter for Board determination; and Respondents' recourse is at that level. *Iowa Beef Packers, supra.* Applying existing policy, I find that the extensions of the strike notices satisfied the requirements of Section 8(g).

VIII. Nature of the Strike

[65] *Ibid*, fn. 63.

At each of the 15 homes that experienced a strike, issuance of the strike notice and the decision to strike were put to separate votes at meetings conducted by the Union representatives. At these meetings, the Union representatives enumerated the various perceived unfair labor practices at the facility, and in many cases, apprised the members of similar unfair labor practices occurring at other facilities as well. The Union representatives clearly informed the bargaining unit members that the vote was being undertaken to protest Respondents' unfair labor practices. It was made clear to members that the strike was not in furtherance of the Unions' demands in contract negotiations. The testimony of the Union representatives conducting the meetings at each facility as well as the testimony of corroborating employee witnesses attending meetings at each facility is consistent and credible. It clearly establishes that the employees voted to strike in protest against persistent and numerous unfair labor practices which, on this record are shown to have occurred at each of the 15 facilities.

Further, in addition to striking over Respondent's unfair labor practices in their own facilities, the employees struck in sympathy over unfair labor practices at the 5 other facilities operated by Respondents. That aspect of the strike is also protected under the Act. *C. K. Smith & Co., Inc.*, 227 NLRB 1061, 1072 (1977), enf'd. 569 F.2d 162, 165-166 (1st Cir. l977).

Respondents were well aware the strikers were protesting unfair labor practices. In their notices, the Unions characterized the strike as an unfair labor practice strike; and through picket signs and public statements, the Unions and striking employees amply conveyed that they were engaged in an unfair labor practice strike.[66]

It is well settled that a strike is considered to be an unfair labor practice strike as long as one of its objectives is to protest unfair labor practices. *Kosher Plaza Supermarket*, 313 NLRB 74, 88 (1993); *R & H Coal Co.*, 309 NLRB 28 (1992); *Northern Wire Corp.*, 291 NLRB 727, fn. 4 (1988), enfd. 887 F.2d 1313 (7th Cir. 1989). This being the case, the fact that frustration over the slow progress of contract negotiations may have played a part in the strike vote lacks significance.

Having established that that Respondent committed the numerous and diverse unfair labor practices before the strike and, further, that the strike was to protest those unfair labor practices, it follows that Respondents had an obligation under the Act immediately to reinstate the strikers to their former positions upon their unconditional offer to return to work[67] and that their failure so to do constitutes an additional unfair labor practice.[68] *Teledyne Still-Man*, 298 NLRB 982, 985 (1990); *American Gypsum Co.*,

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[66]The local Unions had supported a "Dignity" campaign that made general contract demands for all nursing home workers in Pennsylvania, including those employed at Respondent facilities as well as other facilities owned by entities unrelated to Respondent. Literature and T-shirts supporting the Dignity campaign had the logo "one contract, one fight." The fact that some Union members wore such T-shirts to Union meetings or even on the picket line, albeit under coats, jackets and rain gear, does not transform what was clearly an unfair labor practice strike into an economic strike.

[67] Respondents stipulated there was an unconditional offer to return to work on behalf of every striker. (Tr. 221)

[68] At the conclusion of the strike, about 350 former strikers were completely denied reinstatement and an additional 100 were not reinstated to their former positions at 15 facilities based upon Respondents' claim that it had a right to and did permanently replace the strikers. After the strike, Respondent continued to reinstate former strikers only as positions became available, without regard to placing them in their former classification, department, number of hours or shift. Typically, a former striker was first offered reinstatement as a casual (on call) or

Continued

285 NLRB 100 (1987). It is a violation of Section 8(a) (3) of the Act to fail to reinstate such strikers. *Radio Electric Service Co.*, 278 NLRB 531, 535 (1986). See also *NLRB v. Cast Optics Corp.*, 458 F.2d 398, 407-408 (3rd Cir.), cert. denied 409 U.S. 850 (l972); *Grondorf, Field, Black & Co.*, 318 NLRB 996 (1995); *Orit Corp.*, 294 NLRB 695, 699 (l989); *Accurate Die Casting Co.*, 292 NLRB 284 (1989).

IX. Affirmative Defenses

Earlier in this decision I considered and ruled on an affirmative defense asserted by Respondents (page 4). Others are addressed here.

Respondents claim allegations of the amended complaint are subject to deferral under *Collyer Insulated Wire,* 192 NLRB 837 (1971) and *Dubo Manufacturing Corporation*, 142 NLRB 431 (1963). Since all of the collective bargaining agreements expired before the actions giving rise to the complaint, under applicable Board law, those actions presumptively are not arbitrable under the rationale of *Indiana & Michigan Electric Co.*, 284 NLRB 53 (1987).

Moreover, Board policy is to honor timely requests for deferral under *Collyer* when doing so would resolve all issues in a case. Here, there are numerous allegations relating to Respondents' failure to comply with its statutory obligation to provide necessary and relevant information request by the Unions, and those allegations are not deferrable under the *Collyer* policy. Thus, piecemeal deferral as suggested by Respondents would run up against Board policy to resolve an entire dispute in a single proceeding. *15th Avenue Iron Works,* 301 NLRB 878, 879 (1991), enfd. 964 F.2d 1336 (2d Cir. 1992).

Indeed, Respondents' assertion that deferral is ingenuous because they are shown to have unequivocally refused to process outstanding grievances to arbitration since the expiration of the contracts. Thus, by memorandum dated December 7, 1995, Wayne Chapman (there denominated BHRI's "Senior Regional Director of Associate Relations" notified administrators of the facilities involved that the contracts having expired they were, among other things, immediately to effect "elimination of the arbitration provision of the grievance procedure."

Accordingly, I find without merit Respondents' *Collyer* and *Dubo* defense.

Other affirmative defenses are likewise without merit. Thus, the record clearly establishes that Respondents engaged in conduct violative of the Act (Affirmative defense 1); a comparison of the charges and the amended complaint shows that all allegations in the complaint were the subject of charges (Affirmative defense 2); the formal procedural documents received into the record establish that all charges were properly filed and served (Affirmative defense 3); and those documents also prove that the complaint was properly served (Affirmative defense 4 in part) and that all allegations are timely under Section 10(b) of the Act (Affirmative defense 5).

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part-time employee and only later, if at all, offered a full-time position. As casual or part-time employees, many former strikers lost their health insurance and other contractual benefits. In January 1997, 11 months after the three day strike, 66 former strikers still had not been offered reinstatement in any capacity and 237 former strikers who were not reinstated to the positions they held before the strike. In addition, other former strikers were offered reinstatement to positions that were not their former positions and which were, for various reasons, unacceptable.

X. Overview

Considering the record as a whole I perceive a single unifying theme underlying the numerous and varied violations found: Respondents' abiding determination to demonstrate to employees, both members of the local Unions and prospective members, the futility of recourse to unionization and its concomitant need to bargain collectively; and in pursuing that objective they were more than willing to and frequently did resort to unlawful means.

Among other things, those means include severing important communications links by revoking union access to facilities and bulletin boards, and discrediting unions' effectiveness by making unilateral changes in terms and conditions of employment and dealing directly with represented employees. Also utilized were an array of coercive tactics such as blatant surveillance of union activities, threats of retaliation, suspension and discharge of union supporters, permanent replacement of unfair labor practice strikers and humiliation of those who eventually were recalled by assigning them to different shifts, with curtailed working hours and loss of benefits.

Conclusions of Law

Respondents BHRI and BE-P are shown to have violated Section 8(a)(1), (3) and (5) of the Act in the particulars and for the reasons stated above, and those violations have affected, and unless permanently enjoined will continue to affect, commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the named Respondents have engaged in unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

In light of my "bifurcating" order (see page 3) the question of whether a single remedial order can and should embrace interrelated "Beverly" companies has been deferred for resolution by me in a separate proceeding which will be set for expeditious processing following an all-party conference call to be held within 10 days of service of this decision. The issues presented in that proceeding, however, concern only whether remedies should extend to any or all of the interrelated Beverly companies, including Respondents BHRI and BE-P, because of asserted common responsibility for the unfair labor practices.

As to those two Respondents, cease and desist orders will be directed against each in regard to unfair labor practices shown to have occurred at facilities admittedly under their direct control and supervision. The validity of those orders does not depend on the result of the "extra remedy" sought in the bifurcated proceeding; and they are subject to normal appeal procedures commencing on service of this decision because, as to those Respondents, this is a final decision within the meaning of Board Regulation 102.45.

Among other things, BHRI and BE-P will be ordered to offer immediate reinstatement to their former jobs all employees who went on strike on April 1 as well as employees (Sharon Proper, Diane McNulty and Sara Sharbaugh) found to have been discriminatorily discharged, and to make them and other employees found to have been wrongfully suspended (Connie Kollar) or otherwise deprived of income, whole for any loss of wages and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F.*

***W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).**

Because of the Respondents' wide-ranging and persistent misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring them to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

Disposition

On these findings of fact and conclusions of law and on the entire record, I issue the following two recommended Orders[69]

ORDER
(BE-P)

Respondent Beverly Enterprises – Pennsylvania, Inc. (BE-P), of Leesburg, Virginia, its officers, agents, successors, and assigns, at the following nursing homes in Pennsylvania: Beverly Manor of Monroeville, Clarion Care Center, Fayette Health Care (Uniontown), Franklin Care Center (Waynesburg), Grandview Health Care (Oil City), Haida Manor (Hastings), Meadville Care Center, Meyersdale Manor, Richland Manor (Johnstown), Beverly Manor of Reading (Mt./ Penn), Caledonia Manor (Fayettsville), Camp Hill Care Center, Carpenter Care Center (Tunkhannock), York Terrace Nursing Center (Pottsville), shall:

1. Cease and desist from

(a) Failing to reinstate unfair labor practice strikers immediately upon receipt of their unconditional offer to return to work.

(b) Ceasing to allow union representatives access to the above facilities as required under provisions of a collective bargaining agreement.

(c) Ceasing to allow posting of union-related notices on bulletin boards in those facilities as required under provisions of a collective bargaining agreement.

(d) Adopting a health insurance plan for employees without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(e) Reducing employees' hours of work and overtime opportunities without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(d) Laying off employees without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(e) Eliminating unit positions and assigning unit work to non-unit employees without affording to their bargaining representative adequate prior notice and

[69] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

opportunity for bargaining.

(f) Requiring employees to work overtime and, for some, eliminating opportunities for voluntary overtime without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(g) Failing to give employees' bargaining representatives adequate prior notice and opportunity for bargaining before changing contractual terms and conditions of employment, including: work schedules and advance posting requirements with respect thereto, absentee policies, the period required for doctor certification of absences for illness, rules relative to vacation scheduling and duration, and job descriptions.

(h) Failing to honor union bargaining requests.

(i) Bypassing appropriate union representative and dealing directly with unit employees.

(j) Failing to comply with union requests for information relevant and necessary for collective bargaining.

(k) Failing to process grievances in a timely manner,

(l) Engaging in and threatening unlawful surveillance of employees' union activities.

(m) Threatening employees with discipline and discharge for supporting unions and for complaining about working conditions.

(n) Threatening to grant wage increases to replacement workers in the event of a strike.

(o) Soliciting and impliedly promising to remedy employee grievances.

(p) Disparaging employees from engaging in the protected concerted action of protesting perceived unfair working conditions by calling them "assholes and fucking idiots."

(q) Prohibiting employees from leaving union literature in the breakroom and prematurely removing it therefrom and from selling union insignia at offduty times in the breakroom.

(r) Suspending employee Connie Kollar for urging other employees to support the union.

(s) Changing the job description of unionized Licensed Practical Nurses (LPNs) without affording to their bargaining representative adequate prior notice and opportunity for bargaining, and for discriminatory reasons.

(t) Refusing to respond to an information request of the union relative to the changes in LPN status and refusing to bargain and dealing directly with LPNs about the changes.

(u) Changing LPN work and vacation schedules without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(v) Refusing to allow a duly selected employee union representative to attend an a labor-management meeting.

(w) Reducing the working hours of employee Beverly Higbee for engaging in union activities.

(x) Discharging LPNs Sharon Proper, Diane McNulty and Sara Sharbaugh for actively supporting unionization and to deter others from doing so.

(y) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order offer full reinstatement to their former jobs Sharon Proper, Diane McNulty and Sara Sharbaugh as well as all employees who participated in the unfair labor practice strike which commenced on April 1, 1996 without prejudice to their seniority or any other rights or privileges previously enjoyed; and make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the Remedy section of the decision.

(b) On request, rescind all unilateral actions here found to have been effected in violation of collective bargaining obligations and make any employee adversely affected by those actions, or by unlawful discriminations, whole for any loss of earnings and other benefits suffered as a result thereof in the manner set forth in the Remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and the suspension of Connie Kollar and within 3 days thereafter notify the employees in writing that this has been done and that the discharges/suspension will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at the nursing homes named above copies of the attached notice marked "Appendix."[70] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[70] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found in relation to this Respondent

Issues concerning whether remedies should extend to any or all of the interrelated Beverly companies, including Respondents BHRI and BE-P, because of asserted common responsibility for the unfair labor practices, are hereby severed and reserved for resolution by me in a separate supplemental proceeding.

ORDER
(BHRI)

Respondent Beverly Health and Rehabilitation Services, Inc. (BHRI), of Ft. Smith, Arkansas, its officers, agents, successors, and assigns, at the following nursing homes in Pennsylvania: Mt. Lebanon Manor, Murray Manor (Murrysville), William Penn (Lewistown), Beverly Manor of Lancaster, Blue Ridge Haven Convalescent Center (Camp Hill), and Stroud Manor (Stroudsburg), shall:

1. Cease and desist from

(a) Failing to reinstate unfair labor practice strikers immediately upon receipt of their unconditional offer to return to work.

(b) Ceasing to allow union representatives access to the above facilities as required under provisions of a collective bargaining agreement.

(c) Ceasing to allow posting of union-related notices on bulletin boards in those facilities as required under provisions of a collective bargaining agreement.

(d) Laying off employees without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(e) Reducing employees' hours of work and overtime opportunities without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(f) Requiring employees to return home and retrieve their identification badges before permitting them to work without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(g) Eliminating unit positions and assigning unit work to non-unit employees without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(h) Engaging in unlawful surveillance of employees' union activities.

(i) Changing the break schedule of union supporters to inhibit their ability to engage in union related activities at the facilities.

(j) Coercively soliciting employees to resign from union membership, interrogating them about their willingness to strike, and threatening them with reduced hours if they did so.

(k) Reducing employees' hours to discourage them from continuing to support the union.

(l) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order offer all employees who participated in the unfair labor practice strike which commenced on April 1, 1996 full reinstatement to their former jobs without prejudice to their seniority or any other rights or privileges previously enjoyed; and make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them in the manner set forth in the remedy section of the decision.

(b) On request, rescind all unilateral actions here found to have been effected in violation of collective bargaining obligations and make any employee adversely affected by those actions, or by unlawful discriminations, whole for any loss of earnings and other benefits suffered as a result of thereof in the manner set forth in the Remedy section of the decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at the nursing homes named above copies of the attached notice marked "Appendix."[71] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found in relation to this Respondent

Issues concerning whether remedies should extend to any or all of the interrelated Beverly companies, including Respondents BHRI and BE-P, because of asserted common responsibility for the unfair labor practices, are hereby severed and reserved for resolution by me in a separate supplemental proceeding.

Dated, Washington, D.C. November 26, 1997

_____

Robert T. Wallace
Administrative Law Judge

[71] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX
(BE-P)

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice at the following nursing homes in Pennsylvania:

> **Beverly Manor of Monroeville, Clarion Care Center, Fayette Health Care (Uniontown), Franklin Care Center (Waynesburg), Grandview Health Care (Oil City), Haida Manor (Hastings), Meadville Care Center, Meyersdale Manor, Richland Manor (Johnstown), Beverly Manor of Reading (Mt./ Penn), Caledonia Manor (Fayettsville), Camp Hill Care Center, Carpenter Care Center (Tunkhannock), York Terrace Nursing Center (Pottsville).**

Section 7 of the Act gives employees these rights.

> **To organize**
> **To form, join, or assist any union**
> **To bargain collectively through representatives of their own choice**
> **To act together for other mutual aid or protection**
> **To choose not to engage in any of these protected concerted activities.**

WE WILL NOT fail to reinstate employees who participate in unfair labor practice strikes immediately upon receipt of their unconditional offer to return to work.

WE WILL NOT refuse union representatives access to the above facilities as required under provisions of a collective bargaining agreement.

WE WILL NOT refuse to allow posting of union-related notices on bulletin boards in those facilities as required under provisions of a collective bargaining agreement.

WE WILL NOT adopt health insurance plans for employees without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

WE WILL NOT reduce your hours of work and overtime opportunities without affording to your bargaining representative adequate prior notice and opportunity for bargaining.

WE WILL NOT lay you off without affording to your bargaining representative adequate prior notice and opportunity for bargaining.

WE WILL NOT eliminate unit positions and assign unit work to non-unit employees without affording to your bargaining representative adequate prior notice and opportunity for bargaining.

WE WILL NOT require you to work overtime and or eliminate opportunities for voluntary overtime without affording your bargaining representative adequate prior notice and opportunity for bargaining.

WE WILL NOT fail to give your bargaining representative adequate prior notice and opportunity for bargaining before changing contractual terms and conditions of employment, including: work schedules and advance posting requirements with respect thereto, absentee policies, the period required for doctor certification of absences for illness, rules relative to vacation scheduling and duration, and job descriptions.

WE WILL NOT fail to honor union bargaining requests.

WE WILL NOT bypass your union representative and deal directly with you.

WE WILL NOT fail to comply with union requests for information relevant and necessary for collective bargaining.

WE WILL NOT fail to process grievances in a timely manner.

WE WILL NOT engage in or threaten unlawful surveillance of your union activities.

WE WILL NOT threaten you with discipline and discharge for supporting unions or for complaining about working conditions.

WE WILL NOT threaten to grant wage increases to replacement workers in the event of a strike.

WE WILL NOT solicit and impliedly promise to remedy your grievances.

WE WILL NOT disparaging you from engaging in the protected concerted action of protesting perceived unfair working conditions by calling you "assholes and fucking idiots" or by other derogatory names.

WE WILL NOT prohibit you from leaving union literature in the breakroom nor will we prematurely remove it and WE WILL NOT prevent you from selling union insignia at offduty times in the breakroom.

WE WILL NOT suspend or otherwise discipline you from urging other employees to support the union.

WE WILL NOT change job descriptions without affording your bargaining representative adequate prior notice and opportunity for bargaining.

WE WILL NOT refuse to respond to information requests of unions relative to the changes job descriptions and job responsibilities or refuse to bargain or dealing directly with you about such changes.

WE WILL NOT change work and vacation schedules without affording your bargaining representative adequate prior notice and opportunity for bargaining.

WE WILL NOT refuse to allow duly selected employee union representatives to attend a labor-management meetings or otherwise impede them from carrying out their duties as representatives.

WE WILL NOT reduce your working hours for engaging in union activities.

WE WILL NOT discharge or otherwise discipline you for actively supporting unionization

WE WILL NOT In any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL promptly offer full reinstatement to their former jobs Sharon Proper, Diane McNulty and Sara Sharbaugh as well as all employees who participated in the unfair labor practice strike which commenced on April 1, 1996 without prejudice to their seniority or any other rights or privileges previously enjoyed; and make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the unlawful discrimination practiced against them.

WE WILL, on request, rescind all unilateral actions found to have been effected in violation of our collective bargaining obligations and WE WILL make any employee adversely affected by those actions, or by unlawful discriminations, whole for any loss of earnings and other benefits suffered as a result.

WE WILL remove from our files any reference to the unlawful discharges of Sharon Proper, Diane McNulty and Sara Sharbaugh and the suspension of Connie Kollar and within 3 days thereafter notify those employees in writing that this has been done and that their discharges and the suspension will not be used against them in any way.

_____

(Beverly Enterprises – Pennsylvania, Inc.)

Dated _____ **By** _____

(Representative) **(Title)**

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1000 Liberty Avenue, Room 1501, Pittsburgh, Pennsylvania 15222–4173, Telephone 412–395–6899.

APPENDIX
(BHRI)

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice at the following nursing homes in Pennsylvania:

> **Mt. Lebanon Manor, Murray Manor (Murrysville), William Penn (Lewistown), Beverly Manor of Lancaster, Blue Ridge Haven Convalescent Center (Camp Hill), and Stroud Manor (Stroudsburg).**

Section 7 of the Act gives employees these rights.

> **To organize**
> **To form, join, or assist any union**
> **To bargain collectively through representatives of their own choice**
> **To act together for other mutual aid or protection**
> **To choose not to engage in any of these protected concerted activities.**

WE WILL NOT fail to reinstate employees who participate in unfair labor practice strikes immediately upon receipt of their unconditional offer to return to work.

WE WILL NOT refuse union representatives access to the above facilities as required under provisions of a collective bargaining agreement.

WE WILL NOT refuse to allow posting of union-related notices on bulletin boards in those facilities as required under provisions of a collective bargaining agreement.

WE WILL NOT reduce your hours of work and overtime opportunities without affording to your bargaining representative adequate prior notice and opportunity for bargaining.

WE WILL NOT lay you off without affording to your bargaining representative adequate prior notice and opportunity for bargaining.

WE WILL NOT require you to return home and retrieve your identification badges before permitting you to work without affording your bargaining representative adequate prior notice and opportunity for bargaining.

WE WILL NOT eliminate unit positions and assign unit work to non-unit employees without affording to your bargaining representative adequate prior notice and opportunity for bargaining.

WE WILL NOT engage in unlawful surveillance of your union activities.

WE WILL NOT change break schedules of union supporters to inhibit their ability to engage in union related activities.

WE WILL NOT reduce your work hours to discourage you from continuing to support the union.

WE WILL NOT coercively solicit you to resign union membership, interrogate you about your willingness to strike, or threaten you with reduced hours if you do so.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL promptly offer full reinstatement to all employees who participated in the unfair labor practice strike which began on April 1, 1996 without prejudice to their seniority or any other rights or privileges previously enjoyed; and make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination practiced against them.

WE WILL, on request, rescind all unilateral actions found to have been effected in violation of our collective bargaining obligations or as a result of unlawful discriminatory actions and WE WILL make any employee adversely affected by those actions whole, with interest, for any loss of earnings and other benefits suffered as a result.

_____

(Beverly Health and Rehabilitation Services, Inc.)

Dated _____ **By** _____

(Representative) **(Title)**

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1000 Liberty Avenue, Room 1501, Pittsburgh, Pennsylvania 15222–4173, Telephone 412–395–6899.